IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 509

THE CITY OF TACOMA, A MUNICIPAL CORPORATION,
Petitioner,

v.

THE TAXPAYERS OF TACOMA, WASHINGTON, AND ROBERT SCHOETTLER, AS DIRECTOR OF FISHERIES, AND JOHN A. BIGGS, AS DIRECTOR OF GAME, OF THE STATE OF WASHINGTON, AND THE STATE OF WASHINGTON, A SOVEREIGN STATE, *Respondents.*

BRIEF OF PETITIONER

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BRIEF OF PETITIONER

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of the State of Washington (R. 268), together with a dissenting opinion (R. 287), was filed February 7, 1957. An "Addition to Opinion" of the Court (R. 370) was filed

April 30, 1957. The opinion and "addition" are consolidated in the published reports, 49 Wn. 2d 781, 307 P. 2d 567 (1957), and are reprinted as Appendix A to the Petition for Certiorari in the present case.

A prior opinion in the same case is reported in 43 Wn. 2d 468, 262 P. 2d 214 (1953), and appears at R. 65.

The related opinion and order of the Federal Power Commission (Opinion 221 on Project 2016), granting petitioner a license to construct the dams in question, are reported in 92 P.U.R. (n.s.) 79. The opinion appears at R. 18-27 and the order at R. 27-48.

The related opinion of the United States Court of Appeals for the Ninth Circuit, affirming the Federal Power Commission's order, *State of Washington Department of Game, et al.* v. *Federal Power Commission* [*City of Tacoma, Intervener*], is reported at 207 F. 2d 391 (1953), *cert. denied*, 347 U.S. 936 (1954).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. C., section 1257(3). The judgment (R. 372) was entered April 30, 1957. Time to file petition for writ of certiorari was extended by this Court to and including September 27, 1957 (R. 382). Petition for writ of certiorari was filed September 27, 1957. Certiorari was granted December 9, 1957 (R. 383).

STATUTE INVOLVED

The following sections of the Federal Power Act (Act of June 10, 1920, c. 285, 41 Stat. 1063, *et seq.*) are involved: Sec. 4(e) (16 U.S.C. §797(e)), Sec.

7(a) (16 U.S.C. § 800(a)), Sec. 9(b) (16 U.S.C. § 802(b)), Sec. 21 (16 U.S.C. § 814), Sec. 313(b) (16 U.S.C. §825*l* (b)). These are printed in the Appendix.

QUESTIONS PRESENTED

The Federal Power Commission issued a license to the City of Tacoma, Washington, to construct a power project on the Cowlitz River, over the objections of the State of Washington that it would interfere with anadromous fish runs and would take State property. The State petitioned the Ninth Circuit Court of Appeals under Section 313 (b) of the Federal Power Act to review the Commission's order. That court affirmed the order and this Court denied certiorari. While that case was pending, Tacoma commenced the present action, a declaratory judgment proceeding in the State courts to validate a bond issue for construction of the project. After a decision of the State Supreme Court on the Taxpayers' demurrer to its complaint, favorable to Tacoma, the City commenced construction. The State intervened as an added defendant, and, on cross-complaint, obtained an injunction against sale of the bonds and construction of the project on the ground that it would interfere with public navigation. On appeal, the State Supreme Court affirmed, but on the ground that the project would inundate a State-owned fish hatchery which the State Game Commission refused to permit Tacoma to replace, and which the Federal Power Act did not and could not authorize Tacoma to condemn in the absence of such authorization by State legislation. The case is here on certiorari to that judgment.

The Petition for Certiorari (p. 3) presented the following question:

May a state enjoin construction of a dam and power plant affecting navigable waters of the United States, licensed by the Federal Power Commission, upon the ground that the power of eminent domain conferred by Section 21 of the Federal Power Act upon licensees cannot be exercised by a municipality to condemn lands dedicated by the state to a public use (here as a fish hatchery) within the project reservoir area, absent state legislation specifically conferring such authority?

This question is briefed at pp. 29-66, *infra*.

The Petition stated (p. 3) that should certiorari be granted upon the foregoing question, the petitioner requests the privilege of briefing and arguing the following question:

Is a state barred from litigating the authority of municipalities to condemn such property where the Federal Power Commission, in license proceedings to which the state was a party, has held that the applicant "has submitted satisfactory evidence of compliance with the requirements of all applicable State laws insofar as necessary to effect the purposes of a license for the project;" and the Federal Circuit Court of Appeals, on the state's petition for review, has sustained the Commission's order and license?

This question is briefed at pp. 66-78, *infra*.

The real contest, however, is not over the hatchery, but the dams: This contest has erupted now eight times in five tribunals. If the hatchery were being taken for some use not related to construction of a power dam, this case would not necessarily be here. The ultimate issue is whether the Federal Power Commission's comprehensive multiple-purpose plan of development of the Cowlitz River by a public power

agency for navigation, flood control, power, fish conservation, and recreation, or the State Game Commission's single-purpose plan for fish conservation, which would prevent construction of the dams, shall prevail. Secondarily involved is the issue of whether the resolution of this basic conflict between fishery and power resources made by the Federal Power Commission and the Ninth Circuit Court of Appeals shall have the finality prescribed by Section 313 (b) of the Federal Power Act.

STATEMENT OF THE CASE

The facts, in chronological order, are as follows:

1. Proceedings Before the Federal Power Commission

On December 28, 1948, the City of Tacoma, Washington, filed with the Federal Power Commission an application for a Federal license to construct a power project to include two dams on the Cowlitz River affecting navigable waters of the United States.[1]

The River

The Commission described the river in controversy as follows (R. 13):

> "The Cowlitz River, a tributary of the Columbia River in southwestern Washington, drains the

[1] On August 6, 1948, Tacoma filed a declaration of intention, under section 23 of the Federal Power Act, to build the Cowlitz Project (R. 12). The Governor and Director of Public Utilities of the State were notified (R. 13). They did not request a hearing on jurisdictional questions (R. 15). On March 8, 1949, the Commission found that the Cowlitz was navigable below the two dam sites (R. 15), that their construction would affect the navigable capacity of navigable waters of the United States and the interest of interstate or foreign commerce (R. 15), and that, as provided in section 23, a license under the Federal Power Act was required (R. 16). These findings remain unchallenged.

western slope of the Cascade Range from Mount Rainier on the north to Mount Adams and Mount St. Helens on the south. The Cowlitz flows westerly for about 100 miles, then turns south for 30 miles and joins the Columbia River at Longview, Washington, the point of junction being about 65 miles above the mouth of the Columbia River. At the point of junction both the Columbia and Cowlitz are tidal rivers and the Cowlitz has an average flow at the point of junction of about 10,000 cubic feet per second.[2] The Cowlitz has a total drainage area of 2,490 square miles."

The Hatchery

The State of Washington, through its Department of Fisheries and Department of Game, was granted leave to intervene in the license proceedings. The State contended that the license should be denied because of injury which the dams would cause to anadromous fish, asserted conflict of the project with "fish sanctuary" laws of Washington,[3] which prohibited construction of any dam higher than 25 feet on the Cowlitz and certain other streams, and alleged in its petition:

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[2] Counsel's note: This equals about 7,200,000 acre-feet per annum. The Cowlitz thus has an annual average flow about equal to that of the Mississippi at St. Paul, or the Savannah at Augusta, and about seven-eighths of that of the Potomac at Washington. (U.S.G.S. Water Supply Papers 1388 (1955), 1383 (1955) and 1272 (1953).

[3] Laws 1949, ch. 9, RCW 75.20.010 et seq. Other State statutes pleaded at various times in this case by the State have included Laws 1949, ch. 112, §§ 46, 49, requiring a state permit for diversion of water: RCW 75.20.100; RCW 90.28.060, requiring state approval of plans for a dam, and of facilities therein for protection of fish; Laws 1917, ch. 117, § 27, as amended (RCW 90.20.010), requiring a state permit for appropriation of water; RCW 80.40.010, prohibiting obstruction of public navigation.

"That the reservoirs which would be created by the proposed dams would inundate a valuable and irreplacable fish hatchery owned by the State of Washington, as well as much productive spawning areas."[1]

This hatchery is the crux of the controversy now before this Court, as will appear. The State declined to permit its replacement outside the reservoir area at Tacoma's expense (R. 175), and denies Tacoma's power to condemn it under section 21 of the Federal Power Act.

After extensive hearings, consuming twenty-four days (R. 293) and resulting in a record of 4,392 printed pages (R. 294), the Commission entered an Opinion (R. 18) and Order (R. 27-48) for issuance of a license.

The Project

The project, as described by the Commission (Finding 2, R. 28-29; Finding 63, R. 40-42), will consist of two dams, Mossyrock and Mayfield, with appurtenant reservoirs and power plants, and a transmission line to Tacoma. Mossyrock Dam, to be located 65 miles above the confluence with the Columbia, will rise 510 feet above bedrock, and will have an installed capacity initially of 225,000 kilowatts and ultimately of 300,000 kilowatts (R. 40-41). Mayfield Dam, at mile 52, below Mossyrock, will rise 240 feet above bedrock and create a reservoir extending 13.5 miles upstream (to the foot of Mossyrock Dam). This is the reservoir which would flood the hatchery. Mayfield power plant will have an initial installed capacity of 120,000 kilowatts and an ultimate capacity

[1] The State's Petition is quoted in the dissenting opinion in the Supreme Court of Washington in the instant case (R. 292).

of 160,000 kilowatts (R. 41). The ultimate capacity is thus 460,000 kilowatts.[1] The cost estimated by the Commission was about $135,000,000 (R. 34), plus $7,100,000 for fish handling and protective facilities and hatcheries (R. 34), which the Commission increased to $9,465,000 (R. 38). These facilities are to be designed in cooperation with the State (R. 46). They include such hatcheries as the Commission may require, either on its own motion or on the recommendations of the Secretary of the Interior (R. 46).

The Conflict Between Fishery Resources and Power Resources

In the opinion which accompanied the order (Opinion No. 221, R. 18), the Commission carefully considered the conflict between the two uses of the water resource involved in the present dispute, for power and fish, and concluded (R. 26-27):

> "We are required to consider all of the possible advantages and disadvantages of the City's proposal from the standpoint of the greatest public benefit through the use of these valuable water and other natural resources. The question posed does not appear to us to be between all power and no fish but rather between large power benefits (needed particularly for defense purposes), important flood control benefits and navigation benefits, with incidental recreation and intangible ben-

[1] The opinion of the Commission (R. 18) points out that this would add about 10 per cent to the then existing total installed capacity in the Pacific Northwest power pool.

For comparison with the Cowlitz Project's ultimate installed capacity of 460,000 kilowatts, that of Bonneville Dam is 518,000 k.w. (Annual Report of U.S. Columbia River Power System, Fiscal Year 1956, p. 32); Shasta Dam, 379,000 k.w.; Hoover Dam, 1,249,800 k.w. (Annual Report of the Secretary of the Interior, Fiscal Year 1957, p. 46, Table 5).

efits, balanced against some fish losses, or a retention of the stream in its present natural condition until such time in the fairly near future when economic pressures will force its full utilization. With proper testing and experimentation by the City of Tacoma, in cooperation with interested State and Federal agencies, a fishery protective program can be evolved which will prevent undue loss of fishery values in relation to the other values. For these reasons we are issuing the license with certain conditions which are set forth in our accompanying order." (R. 26-27).

THE FEDERAL POWER COMMISSION'S FINDINGS

The Commission, in its order, found:

"(53) The Applicant is a municipal corporation; it has submitted satisfactory evidence of compliance with the requirements of all applicable State laws insofar as necessary to effect the purposes of a license for the project; and it is a municipality within the meaning of Section 3 (7) of the Act." (R. 39)

The Commission further found:

"(59) Under present circumstances and conditions and upon the terms and conditions hereinafter included in the license, the project is best adapted to a comprehensive plan for improving or developing the waterway involved for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the conservation and preservation of fish and wildlife resources, and for other beneficial public uses including recreational purposes." (R. 39-40)

The Commission so defined the project boundaries and reservoir areas as to include the hatchery here in

question (Finding 63 (d), R. 42), and imposed navigation and flood control criteria which would require utilization of the Mayfield reservoir to its maximum elevation (Special Articles 34-35, R. 47-48), flooding the hatchery buildings (R. 292-3).

The Commission found:

> "(65) The Secretary of the Army and the Chief of Engineers have approved the project plans insofar as they affect the interests of navigation and flood control, upon the license conditions hereinafter provided for the protection of such interests." (R. 44)

The Commission inserted the following "special condition" in the license:

> "*Article 31.* The Licensee shall construct, maintain and operate such fish ladders, fish traps or other fish handling facilities or fish protective devices and make such stream improvements *and provide such fish hatcheries* and similar facilities and comply with such reasonable modifications of the project structures and operation in the interest of fish as may be prescribed hereafter by the Commission upon its own motion or upon the recommendation of the Secretary of the Interior." (Emphasis supplied.)[1] (R. 46.)

Issuance of the License

License issued November 28, 1951 (R. 48), and was accepted by Tacoma (Findings of Fact by Superior Court, Par. IV, R. 253). This license was amended February 24, 1954, to extend the time for commencement of the project to December 31, 1955 (R. 159, 160),

[1] For other "special conditions" for fish protection, see Article 30 (R. 46). For findings as to the relative value of the fishery resource and the cost to the licensee of the protective works required by the Commission, see Findings 43-51 (R. 37-38).

and construction was commenced within this time (Findings of Fact by Superior Court, Par. II, R. 253).

2. Review of the Commission's Order by the Ninth Circuit Court of Appeals

The State of Washington, with others, petitioned the Ninth Circuit Court of Appeals for review of the Federal Power Commission's order under Section 313 of the Federal Power Act, 16 U.S.C.A. Sec. 825*l* (b). On October 5, 1953, the Court handed down an opinion declining to interfere with the Commission's order. *State of Washington Department of Game, et al.* v. *Federal Power Commission,* 207 F. 2d 391 (9th Cir. 153), *cert. denied* 347 U. S. 936 (1954); (Reprinted as Appendix D, p. 112 (a), to the Petition for Certiorari in the present case). In the course of its opinion the court said:

P. 396 (App. D to petition, p. 121a):

> "Consistent with the First Iowa case, supra, we conclude that the state laws cannot prevent the Federal Power Commission from issuing a license or bar the licensee from acting under the license to build a dam on a navigable stream since the stream is under the dominion of the United States. However, we do not touch the question as to the legal capacity of the City of Tacoma to initiate and act under the license once it is granted. There may be limitations in the City Charter, for instance, as to indebtedness limitations. Questions of this nature may be inquired into by the Commission as relevant to the practicability of the plan, but the Commission has no power to adjudicate them.[15a]"

"[15a] See City of Tacoma v. Taxpayers, et al., No. 32,411, which is now pending before the Supreme Court of the State of Washington."

Certiorari was applied for and denied: 347 U. S. 936 (1954).[1]

3. The Present Action: Proceedings on Demurrer to Tacoma's Complaint

Tacoma's Complaint

In the meantime, on February 3, 1952 (subsequent to the Commission's issuance of the license, but before the decision of the Ninth Circuit Court of Appeals), the City of Tacoma instituted in the State courts the present action against the Taxpayers of Tacoma and the Directors of Game and Fisheries of the State of Washington (R. 1). It was commenced in the Superior Court of Washington for Pierce County, February 3, 1952, under Rem. Rev. Stat. of Washington, Sec. 784-1, *et seq.*, relating to declaratory judgments, and Rem. Rev. Stat. of Washington, Section 5616-11, *et seq.*, providing for bond validation proceedings (R. 3).

Defendants' Pleadings

Representative taxpayers and their counsel were appointed by the Superior Court (R. 51). On March 27, 1952, the taxpayers filed a demurrer (R. 53).

On May 23, 1952, the Director of Fisheries and the Director of Game, by Assistant Attorneys General of the State of Washington, filed an amended answer and cross-complaint (R. 53).

On June 3, 1952, Tacoma filed a general demurrer to the Directors' Amended Answer and Cross Complaint (R. 56).

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[1] This Court in *Federal Power Commission* v. *Oregon*, 349 U.S. 435, 443, Note 9 (1955), took note of the Ninth Circuit opinion in the Cowlitz case, referring to it as "somewhat of a companion case."

Superior Court's Opinion on Demurrer

On September 18, 1952, the Judge of the Superior Court for Thurston County (to which the case had been transferred from Pierce County by proceedings omitted from the printed record) filed a "Memorandum Opinion" sustaining the Taxpayers' demurrer to Tacoma's complaint (R. 57).

Tacoma stood on its complaint, and the Superior Court entered an order (R. 59) sustaining the demurrer and dismissing the complaint with prejudice.

Tacoma appealed (R. 61) and the Taxpayers and Directors cross-appealed (R. 62).

Thus the instant case stood when the Ninth Circuit Court of Appeals, on October 5, 1953, filed its opinion in *State of Washington Department of Game* v. *Federal Power Commission*, 207 F. 2d 391 (1954), *supra*.

Opinion of Supreme Court of Washington on Demurrer

On October 14, 1953, the Supreme Court of Washington filed an opinion (R. 65) reversing the Superior Court. It took note of the decision of the Ninth Circuit Court of Appeals, stating that that decision had been rendered subsequent to the preparation of its own opinion (R. 70). The court said:

* * *

(R. 89): "It is vigorously asserted by respondents and cross-appellants that appellant, being a municipal corporation created by the state, may not defy the laws of its creator. In other words, assuming that appellant ever had the power to construct dams on rivers resulting in the destruction of fish life, it is contended that the legislature has taken that right away with respect to the Cowlitz

river by enacting the fish sanctuary act (Chap. 9, Laws of 1949).

* * *

(R. 91): ". . . in the present case the right of appellant to proceed with the construction of this project is based on the Federal Power Act which, in turn, is based on the commerce clause of the Federal constitution. Fundamentally, it is the United States whose power to regulate commerce on navigable streams is primarily being questioned in this suit. Appellant's rights under its license from the power commission are governed by the Federal Power Act and have no relation to the Fourteenth Amendment nor to Art. I, § 10, of the Federal constitution.

* * *

"Paraphrasing the language of the supreme court in concluding its opinion in the *First Iowa* case, *supra*, we hold that:

"It is the Federal Power Commission rather than the Director of Fisheries and the Director of Game of the state of Washington which under our constitutional government must pass upon the measures necessary for the protection of anadromous fish in the navigable streams in this state on behalf of the people of Washington as well as on behalf of all the people of the United States."

Three Justices dissented.

Judgment on Demurrer

The Supreme Court of Washington entered its judgment December 14, 1953 (R. 63-64), reversing the judgment of the Superior Court, and remanding.

4. The Present Action: Proceedings from the Decision on Demurrer to Final Judgment

Pleadings

Answers were filed by the Taxpayers (R. 99). Tacoma demurred (R. 105), and the Superior Court sustained the demurrer (R. 105). The court entered an order (R. 121) which "absolved" them from any further defense or prosecution of the action.

On April 29, 1954, the Directors filed a "Second Amended Answer and Cross Complaint" (R. 114).

On May 7, 1954, plaintiff filed a demurrer (R. 117) to the Directors' second amended affirmative defense and cross-complaint (R. 116), and on the same date filed a reply thereto (R. 118).

There the matter rested in the Superior Court for more than a year, without action by that court.

Commencement of Construction

On June 21, 1955, Tacoma awarded bids for the sale of a block of bonds totaling $15,000,000 (R. 271), and on June 22, 1955, awarded construction contracts for the Mayfield Dam (R. 271). These aggregated $16,120,870 (R. 237).

Restraining Order

On June 24, 1955, the Directors "acting for and on behalf of the State of Washington", filed a motion in the Superior Court for a temporary restraining order and injunction *pendente lite* against the continuation of construction of the two dams and the sale of any bonds for construction of the Cowlitz development (R. 123).

On June 24, 1955, the Superior Court issued a temporary restraining order (R. 129), which was subsequently modified (R. 137-8, R. 202, R. 267, R. 377).

Pursuant to these modifications, approximately $7,000,000 has been spent on construction (R. 374).

Amended Complaint

On July 27, 1955, Tacoma moved (R. 138) to file an amended bill of complaint, for the purpose of incorporating certain amendments made within the preceding year to ordinance 14386, and to the Federal Power Commission license.

Addition of the State as a Party

On August 8, 1955, three and a half years after the City had filed this action, and almost two years after the decision of the Ninth Circuit, the State of Washington, "in its sovereign capacity", was added as a party defendant to the action (R. 143), on motion of the Directors of Game and of Fisheries made by the State's Attorney General (R. 140). The answer of the State and Directors (R. 191) alleged that the project would interfere with public navigation (R. 193, par. I), and revived the issue of the power of the City as a municipality of the State of Washington to condemn the same state-owned fish hatchery (R. 193, par. II; R. 194, item (e); R. 196, par. V) that the State and its Departments of Game and Fisheries had posed as a bar to the granting of a license in the proceedings before the Commission some five years previously (R. 292). It also alleged violation of Washington's statutes relating to navigation,[1] to application

[1] Previously the Attorney General had pleaded for the Directors that the Cowitz was non-navigable at the dam sites (R. 116).

and permit requirements for dams, and to water appropriation requirements, and prayed an injunction against construction of the project (R. 199).

Resolution of State Game Commission

Annexed to the answer and cross-complaint as Exhibit I (R. 199, 175) was a resolution of the State Game Commission adopted August 16, 1955, instructing the Director to refuse to sell, and, to resist condemnation of the hatchery here involved. The Commission called it "irreplaceable".

Annexed as Exhibit J (R. 199, 176) was an opinion of the United States District Court for the Western District of Washington, holding that Tacoma could not condemn portions of state highway in that court, but must proceed in the Superior Court for Lewis County.

Trial

The case was tried January 11, 1956. No transcript of the evidence appears in the printed record. From the certified typewritten record (which, by stipulation, may be referred to here), it appears that the testimony related altogether to navigation (Transcript, pp. 336-421) in response to the trial judge's written suggestion to counsel (R. 232-233).

Findings of Fact and Conclusions of Law

The Superior Court filed Findings of Fact (R. 252) and Conclusions of Law (R. 258) on February 27, 1956.

The Court found, among other facts:

> "VI. That the carrying out of the city's project, upon completion of the Mayfield dam

(which the city estimates to be about two years), and the closing of the gates thereof to fill the reservoir created thereby, will inundate a large portion of a state fish hatchery site held for game department purposes, flooding 61.63 acres [1] located in Section 11, Township 12 North, Range 2 East, W. M., in Lewis County, adjacent to the Cowlitz River, used for the propagation, rearing and conservation of game fish. Included in the portion so inundated will be all the fishponds and buildings of such hatchery, all of which are located above high water mark. The state game commission on August 16, 1955, adopted a resolution opposing the city's acquisition of this hatchery, a copy of which resolution is attached to defendants' amended answer and cross-complaint herein and marked Exhibit 'I'."

JUDGMENT OF SUPERIOR COURT

On March 6, 1956, the Superior Court entered its judgment (R. 260). It stated, *inter alia:*

(R. 260): "It Is Hereby Ordered, Adjudged and Decreed that the question of the capacity of the plaintiff to acquire property of the defendant, State of Washington, by eminent domain is not within the jurisdiction of this court.

(R. 261): "It Is Further Ordered, Adjudged and Decreed that the question of damage to fish which might result from construction of plaintiff's Cowlitz Project was passed upon by the Federal Power Commission and the Federal Courts and is not now a proper one for consideration by this Court.

"It Is Further Ordered, Adjudged and Decreed that Sections 27 and 36, Chapter 117, Laws of

[1] Counsel's note: The entire area of this hatchery site is 74.10 acres (R. 194).

1917, as amended (R. C. W. 90.20.010 and 90.28.-060) are inapplicable to said project insofar as the same conflict with the provisions of the Federal Power Act or the terms and conditions of plaintiff's License for said project, or insofar as they would enable State officials to exercise a veto over said project.

"It Is Further Ordered, Adjudged and Decreed that the provisions of Chapter 9, Laws of 1949, (R. C. W. 75.20.010 et seq), and Sections 46, and 49, Chapter 112, Laws of 1949, as amended R. C. W. 72.20.050 and 75.20.100), are inapplicable to said project insofar as the same conflict with the provisions of the Federal Power Act or the terms and conditions of plaintiff's License for said project, or insofar as they would enable State officials to exercise a veto over said project.

"It Is Further Ordered, Adjudged and Decreed that the plaintiff is acting illegally and in excess of its authority in the construction of the Mayfield and Mossyrock hydroelectric project as presently proposed for the reason that said project would necessarily impede, obstruct or interfere with public navigation contrary to the proviso of R. C. W. 80.40.010 et seq.

"It Is Further Ordered, Adjudged and Decreed that the injunction pendente lite, entered October 7, 1955, be continued in effect until July 1, 1956, from and after which later date plaintiff is hereby enjoined from spending any sums of money relating to the Mayfield and Mossyrock hydroelectric project."

Tacoma appealed (R. 262) and the Taxpayers, State, and Directors cross-appealed (R. 263).

Opinions of the Supreme Court of Washington

On February 7, 1957, the Supreme Court of Washington filed an opinion affirming the judgment of the Superior Court (R. 260). Three Justices dissented (R. 287-313). On a motion of Tacoma for rehearing and clarification (R. 313-344), the Court, on April 30, 1957, ordered filed (R. 371-372) an "addition to opinion" (R. 369-370), and entered its judgment (R. 372). The several opinions held as follows:

Majority Opinion of February 7, 1957 (R. 268-287)

The majority opinion (R. 268), after reciting the history of the case, said (R. 277):

> "Although this action has evolved into a Hydra-headed controversy, a single question at its nucleus is determinative of its disposition.
>
> "Does a municipal corporation, created by the state as a subordinate unit, have the power to condemn state lands held in a governmental capacity and previously dedicated to a public use; and if not, can a municipal corporation be endowed by Federal legislation with power to condemn such lands belonging to the state?"

After holding that neither the State court's earlier opinion on demurrer (R. 65), nor the decision of the Ninth Circuit in *State of Washington Department of Game, et al.* v. *Federal Power Commission*, 207 F. 2d 391 (1953) constituted res judicata on the issues involved here (R. 278), the court held (R. 279) that the trial court had erred in holding that the issue of Tacoma's power of eminent domain had not been before the court, and said:

> (R. 284): "We deem it conclusively settled in this jurisdiction that a municipal corporation or

a public corporation does not have the power to condemn state-owned lands dedicated to a public use, unless that power is clearly and expressly conferred upon it by statute.

* * *

(R. 286): "In the instant case, the subject matter—the inherent inability of the city to condemn state lands dedicated to a public use—does not present a question of *state statutory prohibition;* it present a question of lack of *state statutory power* in the city. It does not present a Federal question; it presents a question peculiarly within the jurisdiction of the state of Washington.

"The Federal government may not confer corporate capacity upon local units of government beyond the capacity given them by their creator, and the Federal Power Act, as we read it, does not purport to do so.

"If it be held that the Federal government may endow a state-created municipality with powers greater than those given it by its creator, the state legislature, a momentous and novel theory of constitutional government has been evolved that will eventually relegate a sovereign state to a position of impotence never contemplated by the framers of our constitutions, state and Federal."

Dissenting Opinion

Three Justices dissented. In the course of the dissenting opinion Donworth J. said:

(R. 304): ". . . it is apparent that Congress intended to and did exercise its full power under the commerce clause in providing for the licensing of the projects described therein. When the power commission has made a finding as required by section 9 (b) that the licensee has complied with state laws with respect to the right to engage in the business of developing, transmitting, and dis-

tributing electric power and any other business necessary to effect the purposes of the licensee under the act, then the licensee becomes the agent of the Federal government in regard to the project. Upon the issuance of the license, all rights and obligations of the licensee are derived from congressional constitutional powers, and not those of the state where the project is located. See *First Iowa* case.

* * *

(R. 310): "The Federal power act in section 21 affords a licensee ample authority as an agent of the Federal government to exercise the power of eminent domain without state authority. A state may not deny or impair this authority once a license has been issued."

"ADDITION TO OPINION", APRIL 30, 1957

On April 30, 1957, the Supreme Court of Washington filed an order (R. 371-372) denying Tacoma's petition for rehearing (R. 313), but granting in part the petition for clarification (R. 372).

An "Addition to Opinion" (R. 369-371) filed April 30, 1957, states, *inter alia:*

(R. 370): "Based upon the present record, we agree with that portion of the judgment of the trial court which determines (1) that the question of damage to fish which might result from construction of the dams is not now a proper one for the consideration of the court; and (2) that Laws of 1917, chapter 117, §§ 27 and 36, as amended (RCW 90.20.010—state permit for appropriation of water; RCW 90.28.060—state permission to build a dam), Laws of 1949, chapter 9 (RCW 75.20.010 *et seq.*—establishing Columbia river fish sanctuary), and Laws of 1949, chapter 112, §§ 46 and 49, as amended (RCW 75.20.050—

state permit to divert water; RCW 75.20.100—approval of building plans for the protection of fish), are

> "'. . . inapplicable to said project insofar as the same conflict with the provisions of the Federal Power Act or the terms and conditions of plaintiff's License for said project, or insofar as they would enable State officials to exercise a veto over said project.'

"Our conclusion is amply supported by *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission*, 328 U. S. 152 (1946).

"The same authority supports the conclusion that the trial court erred when it issued the injunction

> "'. . . for the reason that said project would necessarily impede, obstruct or interfere with public navigation contrary to the proviso of R. C. W. 80.40.010 et seq.'

"However, we have held on many occasions that if the judgment of the trial court is based upon erroneous grounds, it will be sustained, if correct on any grounds within the pleadings and established by the proof. *Ennis* v. *Ring*, 149 Wash. Dec. 279, 283, 300 P. (2d) 773 (1956). We have already held that the question of the capacity of the plaintiff to acquire property of the state of Washington by eminent domain is within the jurisdiction of the court; and that the city of Tacoma has not been endowed with the statutory capacity to condemn state lands previously dedicated to a public use. Without this power, it cannot accomplish the plan set forth in the city ordinances before us; hence, for the reasons we have discussed herein, the judgment of the superior court is affirmed."

JUDGMENT (R. 372) AND STAY (R. 377)

The judgment of the Supreme Court of Washington (R. 372) was entered April 30, 1957. A stay of execution (R. 377) was ordered May 7, 1957.

CERTIORARI (R. 383)

This Court entered its order allowing certiorari (R. 383) on December 9, 1957.

SUMMARY OF ARGUMENT

In its "Addition to Opinion" the court held that none of the express state laws (1) requiring a state permit for appropriation of water, (2) requiring a state permit to build a dam, (3) limiting the height of dams to 25 feet, (4) requiring approval of building plans by the Directors of Game and Fisheries for the protection of fish, or (5) prohibiting interference with public navigation, could bar or incapacitate the City from proceeding with the Cowlitz project under its federal license. Thus the court decided that the City was empowered to undertake the project on all issues except one—the *"lack of state statutory power* in the city" to condemn the hatchery lands (R. 286). Upon this sole issue the court affirmed the injunction against the petitioner's construction of the Cowlitz dams.

The court below held, in substance, (1) that the Federal Power Act does not purport to confer on this licensee the power to condemn state-owned lands dedicated to a public use absent authorization by the State legislature, and, (2) if it did so, the Federal Power Act, so applied, would be unconstitutional (R. 286). We say that the Act does confer this power and is constitutional. The issue of statutory interpretation

is discussed in Part I of the Argument, the constitutional issue in Part II. Part III discusses the finality accorded by Section 313 (b) of the Federal Power Act to the decision of the Ninth Circuit Court of Appeals on review of the Commission's order granting the license, which we say disposed of the State's present contentions.

I. As to statutory interpretation.

The language of the statute is plain. Section 21 of the Federal Power Act confers a federal right of eminent domain upon licensees to take the property of others necessary to a project found by the Federal Power Commission justified and desirable in the public interest for the development of a waterway for the benefit of interstate or foreign commerce. The Commission found those conditions to exist. The act does not exclude municipalities from this grant of the power of eminent domain to licensees. To the contrary, Section 3 (5) defines "licensee" to include municipalities, Section 4(e) authorizes licenses to municipalities, and Section 7 (a) directs the Commission to give preference to municipalities in considering applications for a license.

Section 21 is a delegation of federal power, not derived from the state, not dependent upon state acquiescence or upon concurrent state legislation. In this respect it follows the pattern of other federal condemnation statutes which have been judicially construed. When Congress has required state concurrence, it has said so.

Section 21 does not, expressly or by inference, exclude state-owned land from its effect, even though such property has been devoted to a public use. Both

this act and the earlier acts upon which it is patterned have been so construed.

No problem of compensation is involved. Tacoma offered full replacement. The court below denied the licensee's power to condemn in any court, irrespective of amount.

If Section 21 is interpreted as it was below, a device to enable a state to veto a project under the Federal Power Act, sought unsuccessfully in a series of cases in this Court from *New Jersey* v. *Sargent*, 269 U.S. 328 (1926) through *First Iowa Hydro-Electric Coop.* v. *Federal Power Com'n.*, 328 U.S. 152 (1946) to *Federal Power Com'n.* v. *State of Oregon*, 349 U.S. 435 (1953), has been discovered: acquisition by a state, through purchase or condemnation, of land in a reservoir area, dedication thereof by a state commission to the particular public purpose to which that commission is devoted, and refusal to sell.

In such event, the Cowlitz Project, and others similarly situated, could be developed, if at all, only by private power companies or by the Federal Government, not by municipalities or other state-created public power entities. The Federal Power Act did not intend this result. It is avoided by a proper interpretation of Section 21 as encompassing municipal licensees in the full power of condemnation which is granted therein to all licensees. The Commission, not the licensee, determines the area to be taken. The courts may properly protect against its abuse by any licensee, public or private. This is not such a case. The Federal Power Commission was required by the act to weigh the conflicting public interests, did so, and the Ninth Circuit affirmed.

II. As to constitutionality.

This Court has upheld the constitutionality of each of the sections of the Federal Power Act it has considered, as within the plenary power of Congress over navigable waters. While it has not expressly ruled upon Section 21, the Court has approved other sections of the Act imposing federal conditions upon licensees in addition to the requirements of state law. Further, in the *First Iowa* and *Federal Power Com'n.* v. *Oregon* cases, all state laws duplicating or conflicting with "the detailed provisions of the Act" were deemed superseded.

The cases are clear that the Federal Government, when acting pursuant to its constitutional powers for the improvement of a navigable waterway, has power to condemn state-owned land dedicated to a public use. State consent has been uniformly rejected as a condition precedent to the exercise of this federal power.

The authorities are many and long standing that Congress may validly endow state and municipal corporations with federal powers, including eminent domain powers, in addition to or irrespective of their powers or capacity under state law. This device, which had its inception in *Gibbons* v. *Ogden*, has been employed many times by Congress for the construction of bridges, turnpikes, railroads, telegraph lines and dams, for the improvement of interstate commerce.

The State of Washington cannot complain of this. It has authorized its municipalities to engage in the power business and acquire federal licenses under the Act. Having subjected its "creatures" to the commerce clause, the State may not preclude applicability of the particular incidents thereof. Under Congress'

power to regulate interstate commerce, charter or cor
porate limitations under state law are no bar to com
pliance with federal requirements.

III. As to the effect of the decision in the Ninth Circuit Court of Appeals.

Section 313 (b) of the Federal Power Act, author
izing review of an order of the Federal Power Com
mission by a Circuit Court of Appeals, directs that th
finding of the Commission as to facts, if supported b
substantial evidence, shall be conclusive, and that th
judgment of that court shall be final, subject to re
view by this Court upon certiorari. The State par
ticipated in the proceedings before the Commission
objected to issuance of the license upon the ground
inter alia, that the project would inundate its prop
erty, including specifically this hatchery, and peti
tioned the Ninth Circuit Court of Appeals for review
of the Commission's order on the general ground
inter alia, that the project would take its property
The record before that court identified the property a
including the hatchery. The Ninth Circuit Court o
Appeals affirmed the Commission's order, *State o
Washington Dept. of Game* v. *Federal Power Com'n*
207 F. 2d 391 (9th Cir. 1953). The State petitioned
this Court for certiorari, again asserting, in genera
terms, that the project would take its property, with
out specifying the items. This Court denied certiorari
347 U.S. 936 (1954).

In these circumstances, the State's present suit for
an injunction, which it contends is a "fresh lawsuit"
initiated by its cross-complaint on August 8, 1955, is
a collateral attack upon the Commission's order. It
would veto the Commission's license by indirection as

effectively as would the state statutes which vetoed it directly, and which were struck down by the Ninth Circuit. The present attack is barred specifically by the terms of Section 313 (b) as well as by general principles of res judicata.

ARGUMENT

I. AS A MATTER OF STATUTORY INTERPRETATION, SECTION 21 OF THE FEDERAL POWER ACT GRANTS TO THE GOVERNMENT'S LICENSEES A FEDERAL RIGHT OF EMINENT DOMAIN, NOT CONTINGENT UPON CONCURRENT STATE AUTHORIZATION, TO TAKE STATE-OWNED PROPERTY, EVEN THOUGH DEVOTED TO A PUBLIC USE

A. The plain language of the statute.

Section 21 provides, in pertinent part:

> "When any licensee cannot acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with an improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, *it may acquire the same by the exercise of the right of eminent domain* in the district court of the United States for the district in which such land or other property may be located, or in the State Courts. . . ." (16 U.S.C.A. § 814). (Emphasis supplied.)

In terms, Section 21 confers identical powers, (whatever those powers may be) upon "any licensee", certainly not excluding municipal licensees. The prop-

erty subjected to these powers is the "lands or property of others" which cannot be voluntarily acquired, not excluding, in terms at least, the property of the State. The condition to exercise of these powers, to take property which cannot be voluntarily acquired, is alike as to all "licensees", and as to "all lands or property of others". The condition is that the property in question shall be necessary to the construction or operation of works of specified kinds (including dams and reservoirs), in conjunction with an improvement which in the judgment of the Federal Power Commission (not the licensee) is desirable and justified in the public interest for the purpose of improving or developing a waterway for the use or benefit of interstate or foreign commerce. That condition having been met, as it has in this case, the power delegated to the licensee is that "it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located, or in the State courts. . . ."

The language of the statute, on its face, clearly appears to confer on Tacoma the power asserted. But, as the holding was against us on the issue of statutory construction as well as on the issue of constitutionality (R. 286), the problem of interpretation is examined below.

B. Section 21 of the Federal Power Act is an independent delegation of federal power of eminent domain, not a mere acquiescence in the exercise of a power derived from the State.

Section 21 has not been directly construed by this Court. It was cited but not passed upon in *Ford & Son* v. *Little Falls Fibre Co.*, 280 U.S. 369, 379 (1930),

and *Grand River Dam Authority* v. *Grand Hydro*, 335 U.S. 359, 373 (1948), and *Federal Power Com'n.* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239, 254 (1954).

In *First Iowa Hydro-Elec. Coop.* v. *Federal Power Com'n.*, 328 U.S. 152 at 180-81, the Court, after describing the Act as

> ". . . the outgrowth of a widely supported effort of the conservationists to secure enactment of a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, in so far as it was within the reach of the federal power to do so, ..."[1]

said:

> "The detailed provisions of the Act providing for the federal plan of regulation leave no room or need for conflicting state controls.[25] . . ."

In footnote 25, the Court lists, among other items:

> ". . . § 21, federal powers of condemnation vested in licensee . . ."

In the *First Iowa* case the Court, in its detailed analysis of Section 9 (b) as enacted, noted the failure of Congress to adopt a proposed proviso requiring "*the consent of the State or States* in which the dam or other structure for the development of the water power is proposed to be constructed,"[2] and construed the section as follows:

[1] See also *United States ex rel. Chapman* v. *Federal Power Com'n.*, 345 U.S. 153, 167-8 (1953).

[2] Shields Bill, S. 1419, 65th Cong., 2d Sess. (1917), noted in *First Iowa Hydro-Elec. Coop.* v. *Federal Power Com'n*, 328 U. S. at 179 (1946).

". . . It provides for presentation of information to the federal commission and protects the constitutional rights of the States. This explanation does not support the contention of the State of Iowa that § 9 (b) amounts to the subjection of the federal license to requirements of the state law *on the same subject. . . .*" *First Iowa Hydro-Elec. Coop.* v. *Federal Power Com'n.*, 328 U. S. 152, 179 (1946) (Emphasis supplied.)

This Court construed Section 27 as follows:

"The effect of § 27, in protecting state laws from supersedure, is limited to laws as to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature. It therefore has primary, if not exclusive, reference to such proprietary rights. . . .

. . . . . .

"This section therefore is thoroughly consistent with the integration rather than the duplication of federal and state jurisdictions under the Federal Power Act. It strengthens the argument that, *in those fields, where rights are not thus 'saved' to the states, Congress is willing to let the supersedure of the state laws by federal legislation take its natural course.*" (*First Iowa Hydro-Elec. Coop.* v. *Federal Power Com'n.*, 328 U. S. 152 at 175-176 (1946).) (Emphasis supplied.)

By 1920, when Section 21 was written, a considerable number of federal condemnation statutes had been judicially construed, and it had been firmly established that the Federal Government was exercising in these statutes a federal power necessary to the accomplishment of its constitutional functions, not contingent on state acquiescence. *Kohl* v. *United States*, 91 U.S. 367 (1876); *Chappell* v. *United States*, 160 U.S. 499 (1896); *Luxton* v. *North River Bridge Co.*, 147

U.S. 337 (1893); *United States* v. *Jones*, 109 U.S. 513 (1883).

Statutes delegating such powers to non-federal agencies had been similarly construed: *Cherokee Nation* v. *Southern Kansas R. Co.*, 135 U.S. 641 (1890); *Stockton* v. *Baltimore & N. Y. R. Co.*, 32 F. 9 (C.C.D.N.J. 1887.)[1]

Cases construing Section 21 as similarly conferring an independent power of eminent domain, not founded on state law, include *Alabama Power Co.* v. *Gulf Power Co.*, 283 F. 606 (M.D. Ala. 1922), cited with approval by this Court in *First Iowa Hydro-Elec. Coop.* v. *Federal Power Com'n.*, 328 U.S. 152, 176 (1946); *Missouri* v. *Union Electric Light & Power Co.*, 42 F. 2d 692 (C.D. Mo. 1930), quoted below in another connection.

In subsequent cases, the right of a licensee, to invoke Section 21 as a federal grant of power, has generally been accepted without question. See *Wilson* v. *Union Electric Light & Power Co.*, 59 F. 2d 580, 581 (8th Cir. 1932); *Feltz* v. *Central Nebraska Public Power and Irrigation District*, 124 F. 2d 578, 582-583 (8th Cir. 1942); *Central Nebraska Public Power and Irrigation District* v. *Fairchild*, 126 F. 2d 302, 304 (8th Cir. 1942); *Central Nebraska Public Power and Irrigation District* v. *Harrison*, 127 F. 2d 588, 589 (8th Cir. 1942); *cf. Oakland Club* v. *South Carolina Public Service Authority*, 110 F. 2d 84, 85-86 (4th Cir. 1940).

Section 21, in turn, was the pattern for Section 7 (h) of the Natural Gas Act, which was added

[1] These and similar cases are referred to in Part II, pp. 58-62, with reference to the constitutional question.

to the original 1938 Act by a special amendment in the Act of July 25, 1947 (61 Stat. 459, 15 U.S.C.A. § 717 f (h)). The legislative history reveals that Congress considered that it had made a similar grant of federal eminent domain powers in the earlier analogous Section 21 of the Federal Power Act. The House Committee Report said:

> "The proposed amendment provides generally for the exercise of the right of eminent domain by natural-gas companies with respect to necessary rights-of-way in connection with the construction and operation of natural-gas pipe lines. *This proposed amendment is similar to section 21 of the Federal Power Act which provides for the exercise of the right of eminent domain by licensees regarding dam sites.*" (H. Rept. No. 695 on H. R. 2956, 80th Cong. 1st Sess. (1947); 1947 U. S. Code Cong. Service, p. 1477.) (Emphasis supplied.)

See *Thatcher* v. *Tennessee Gas Transmission Co.*, 180 F. 2d 644 (5th Cir. 1950), *cert. denied*, 340 U.S. 829 (1950) and *Williams* v. *Transcontinental Gas Pipe Line Corp.*, 89 F. Supp. 485 (W.D.S.C. 1950), referring to the Natural Gas Act as a "grant" by Congress of the power of eminent domain.

In short, Section 21 is an independent delegation of authority by the Federal Government, and should not be construed as requiring concurrent authorization by the State as a condition to its exercise.

C. The delegation of federal eminent domain powers made to licensees by Section 21 includes municipal licensees.

Section 21 confers federal eminent domain powers upon an authorized "licensee" under the Act to take lands necessary for a project. Section 3 (5)[1] defines

[1] 16 U.S.C.A. § 796 (5).

"licensee" to mean "any person, State, or *municipality* licensed under the provisions of section 4 of this act, . . ." Section 4 (e)[1] authorizes the Commission to issue licenses "to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or *municipality*. . . ." Congress' special regard for municipalities as licensees is shown in Section 7 (a)[2] of the Act which requires the Commission to grant preference to license applications by states and municipalities.

The legislative history of Section 21 supports the clear intent of the Act that Congress intended municipalities to be recipients of the eminent domain powers conferred thereunder. Earlier versions of Section 21 considered by the Congress expressly restricted the grant of the right of eminent domain to state and municipal licensees and public utility or service corporations.[3] The later amendment[4] to its present form to include all licensees indicates no slackening of concern by Congress for municipalities as grantees.

The federal right of eminent domain granted by Section 21 has been exercised by municipalities and related state agencies, when duly licensed, in a number of cases without question. See *Central Nebraska Public Power and Irrigation District* v. *Harrison,* 127 F. 2d 588, 589 (8th Cir. 1942); *Central Nebraska Public Power and Irrigation District* v. *Fairchild,* 126 F. 2d

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[1] 16 U.S.C.A. § 797 (e).

[2] 16 U.S.C.A. § 800 (a).

[3] See S. 1419, 65th Cong., 2d Sess. (1918).

[4] See H. R. 3184, 66th Cong., 2d Sess. (1920).

302, 304 (8th Cir. 1942); *Feltz* v. *Central Nebraska Public Power and Irrigation District,* 124 F. 2d 578, 582-583 (8th Cir. 1942); *cf. Oakland Club* v. *South Carolina Public Service Authority,* 110 F. 2d 84, 85-86 (4th Cir. 1940).

D. Section 21 does not, expressly or by inference, except from its effect state-owned lands or property, even though devoted to a public use.

Section 21 makes no exemption for state lands.

In *Missouri* v. *Union Elec. Lt. & Power Co.,* 42 F. 2d 692 (C.D. Mo. 1930), a frequently cited case, a condemnation under Section 21 of the Federal Power Act was sustained, although the project would create a lake over 100 miles long, "result in submerging both public and private property, including the courthouse and jail", inundate public highways, and divide a county into three parts inaccessible to the other parts. The court said (p. 698):

> "In the instant case the Congress must have contemplated this identical situation; hence the requirement of notice. Moreover, the proposed improvements could not be accomplished, except through the exercise, if necessary, of eminent domain against property already dedicated to public use. To deny the right of eminent domain as against this public property would not only defeat the functions of the national government, but would run contrary to the obvious intent of the Congress as expressed in the Water Power Act. Stockton, Attorney General, v. Baltimore & New York RR Co. (C. C.) 32 F. 9; 20 C. J. § 90, P. 602; Vermont Hydro-Electric Corporation v. Dunn et al., 95 Vt. 144, 112 A. 223, 12 A. L. R. 1495; Imperial Irrigation Co. v. Jayne, 104 Tex. 395, 138 S. W. 575, Ann. Cas. 1914 B, 322."

To make the Federal Power Act's licensing system operate on navigable streams, state-owned lands must

be occupied by every licensee. It was well known at the time of passage of the original Federal Water Power Act in 1920 that the states owned the bed and banks of all navigable streams. *Pollard* v. *Hagan*, 3 How. 212 (U. S. 1845); *Shively* v. *Bowlby*, 1952 U. S. 1, 26, 27 (1894); *Scott* v. *Lattig*, 227 U. S. 229, 242, 243 (1913); *Donnelly* v. *United States*, 228 U. S. 243, 260 (1913).[1]

These state-owned bed and banks of navigable streams were the very lands that Congress directed the Commission to license dams upon, in order to carry out the purposes of the Act "to secure a comprehensive development of national resources".[2] Section 4 (e) empowered the Commission to issue licenses:

> "... *for the purpose of constructing, operating, and maintaining dams,* water conduits, *reservoirs,* power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, *along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States,* ..." (16 U.S.C.A. § 797 (e)). (Emphasis supplied.)

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[1] Subsequent cases affirmed the rule with respect to navigable streams: *Oklahoma* v. *Texas*, 258 U. S. 574, 583 (1922); *United States* v. *Holt State Bank*, 270 U. S. 49, 55 (1926); *Massachusetts* v. *New York*, 271 U. S. 65, 89 (1926); *United States* v. *Utah*, 283 U. S. 64, 75 (1931); *cf. United States* v. *California*, 332 U. S. 19, 30-31, 36-39 (1947), where the Pollard rule was limited to inland navigable waters.

[2] *First Iowa Hydro-Elec. Coop.* v. *Federal Power Comm.*, 328 U. S. 152, 181 (1946).

Where a dam site is in or affects navigable waters, not only the dam site but lands in the reservoir area can be taken pursuant to the dominant federal servitude. Cf. *United States* v. *Twin City Power Co.*, 350 U. S. 222 (1956).[1]

The argument that, by necessary implication, state-owned lands are excluded from the intended scope of a condemnation statute is not new.

In *United States* v. *Carmack*, 329 U. S. 230, 240 (1946), the Court quoted with approval Mr. Justice Bradley's opinion in *Stockton* v. *Baltimore & N. Y. R. Co.*, 32 F. 9 (C.C.D.N.J. 1887):

> " 'The argument based upon the doctrine that the states have the eminent domain or highest dominion in the lands comprised within their limits, and that the United States have no dominion in such lands, cannot avail to frustrate the supremacy given by the constitution to the government of the United States in all matters within the scope of its sovereignty. This is not a matter of words but of things. If it is necessary that the United States Government should have an eminent domain still higher than that of the state, in order that it may fully carry out the objects and purposes of the constitution, then it has it. Whatever may be the necessities or conclusions of theoretical law as to eminent domain or anything else, it must be received as a postulate of the constitution that the government of the United States is invested with full and complete power to execute and carry out its purposes.' "

[1] No question of compensation is involved in our case. Tacoma offered to pay the full cost of relocation of the hatchery it seeks to condemn. The State Game Commission refused (R. 175).

See also *State of Minnesota* v. *United States*, 125 F. 2d 636, 639 (8th Cir. 1942); *Yalobusha County* v. *Crawford*, 165 F. 2d 867, 868 (5th Cir. 1947).

This Court has previously rejected attempts by states to exclude their lands and operations from general federal regulatory acts. In *Case* v. *Bowles*, 327 U. S. 92, 99 (1946), it was held:

> "... Petitioner[1] presses this contention so far as to urge us to accept as a general principle that unless Congress actually uses the word 'state', courts should not construe regulatory enactments as applicable to the states. This Court has previously rejected similar arguments,[5] and we cannot accept such an argument now."[2]

See also *California* v. *Taylor*, 353 U. S. 553, 561-565 (1957).

The State and Directors below continually stressed the specter of a taking of the State Capitol grounds. This Court refused to be frightened by that same ghost on a previous occasion.[3] It is sufficient for present purposes to cite the sage advice of Mr. Justice Frankfurter:

> "The process of Constitutional adjudication does not thrive on conjuring up horrible possibilities that never happened in the real world and devising doctrines sufficiently comprehensive in

[1] Commissioner of Public Lands of the State of Washington. The Commissioner contended that a sale of state lands was exempt from the Emergency Price Control Act.

[2] In footnote 5, the Court cited *Ohio* v. *Helvering*, 292 U. S. 360, 370; *United States* v. *California*, 297 U. S. 175, 186; *California* v. *United States*, 320 U. S. 577, 585.

[3] *City of St. Louis* v. *Western Union Telegraph Co.*, 148 U. S. 92, 101 (1893).

detail to cover the remotest contingency. Nor need we go beyond what is required for a reasoned disposition of the kind of controversy now before the Court. . . ." (*New York* v. *United States*, 326 U. S. 572, 583 (1946).)

The ultimate conflict here is between the plan for development of the Cowlitz River prescribed by the Federal Power Commission and the plan of the State Game Commission.

The hatchery, the one remaining obstacle, is incidental to this clash between the Federal and State plans, which has now appeared on eight occasions in five tribunals. Its presence in a reservoir area is a geographical accident. The hatchery can be relocated; the dams cannot. The present conflict of public purposes must be resolved in favor of the Federal Government when acting pursuant to its delegated constitutional powers. *Arizona* v. *California*, 283 U. S. 423 (1931); *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377 (1940); *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.*, 313 U. S. 508 (1941).

E. The Federal Government, through the Federal Power Commission, determines the necessity of the taking under Section 21, and that has been done.

Section 21 of the Federal Power Act, while authorizing licensees to prosecute condemnation actions, reserves to the judgment of the Commission itself the selection of the site and lands to be taken:

"When any licensee cannot acquire . . . the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir . . . in conjunction with an improvement which *in the judgment of the Commission is desirable and justified in the public interest for the*

purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce. . . .'" (16 U.S.C.A. § 814.) (Emphasis supplied.)

The Federal Power Commission, in these same terms, has found the Cowlitz Project "best adapted to a comprehensive plan for improving or developing the waterway involved for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the conservation and preservation of fish and wildlife resources, and for other beneficial public uses including recreational purposes." (Finding 59, R. 39-40) The project thus described by the Commission (Finding 2, R. 28, Finding 63, R. 40-44), operated at elevations required by the Commission in the interests of navigation and flood control (Special Conditions 34, 35, R. 47-48), will inundate the hatchery, as the State represented to the Commission it would (R. 292-3).

The Federal Power Commission thus identified the Cowlitz dam sites and specified the reservoir areas to be covered by each. See *In Re Condemnations for Improvement of Rouge River,* 266 F. 105 (E. D. Mich. 1920). The general authority given by Section 21 is ample for the taking of any state lands necessary for the federal project, in that the Commission, not Tacoma, has determined the necessity for the taking, and the lands to be included. *Cf. United States* v. *Carmack, supra; United States* v. *State of South Dakota,* 212 F. 2d 14, 16 (8th Cir. 1954); *Yalobusha County* v. *Crawford,* 165 F. 2d 867 (5th Cir. 1947); *United States* v. *State of Montana,* 134 F. 2d 194, 196 (9th Cir. 1943), *cert. denied,* 319 U. S. 772; *State of Minnesota* v. *United States,* 125 F. 2d 636 (8th

Cir. 1943); *C. M. Patten & Co.* v. *United States*, 61 F. 2d 970 (9th Cir. 1932), *decree vacated as moot*, 289 U. S. 705 (1933); *Ryan* v. *Chicago B. & Q. R. Co.*, 59 F. 2d 137, 142 (7th Cir. 1932); *United States* v. *.8677 Acre of Land in Richland County*, 42 F. Supp. 91 (E.D.S.C. 1941); *United States* v. *Certain Parcels of Land*, 30 F. Supp. 372 (D. Md. 1939); *United States* v. *City of Tiffin*, 190 F. 279, 281 (C. C. N. D. Ohio, 1911).

F. If Section 21 were now construed to exclude municipal licensees from the full scope of the power of eminent domain conferred upon licensees in general, the result would be to restrict development of projects in the present situation to the Federal Government or private power companies. This was not the intent of Congress.

If the hatchery cannot be taken, the project cannot be built.

If the project is not built, the Federal Power Commission has described the alternative (which the court's decision below would impose), as "a retention of the stream in its present natural condition until such time in the fairly near future when economic pressures will force its full utilization." (R. 27)

Utilization by whom?

The court below speaks of the necessity that a licensee which is "a municipal corporation or a public corporation" must obtain power from the state legislature to condemn this hatchery in order to build this project (R. 284). "It only questions the capacity of a municipal corporation of this state to act under such license when its exercise requires the condemnation of state-owned property dedicated to a public use" R. 285). The dissenting opinion on demurrer contended that a state statutory prohibition against

these Cowlitz dams should be sustained as against Tacoma as a creature of the State even though not applicable as a bar to development by others (R. 94), *i.e.*, private power companies.

If the opinion below, by its careful reference to "a municipal corporation or a public corporation" (R. 284) intends its "creature of the state" argument to disable only public power agencies of the State of Washington from constructing the Cowlitz Project, then this project can only be built, if at all, by a private power company[1] or by the Federal Government. The "creature of the state" argument does not exclude a foreign corporation licensed by the Federal Power Commission. *Cf. Seaboard Air Line R. Co.* v. *Daniel*, 333 U. S. 118 (1948).

But if the opinion means that no licensee, public *or* private, can build the Cowlitz Project without the State's consent to the inundation of this hatchery, it means that only the Federal Government can condemn this hatchery and build these dams. The Commission was authorized by Section 7 (b) to reserve this site for development by the United States, but it authorized Tacoma to develop it, as the plan best adapted to the public interest. *Cf. United States ex rel. Chapman* v. *Federal Power Com'n.*, 345 U.S. 153 (1953). Congress, on many occasions, has elected to authorize non-federal agencies to build projects under delegated federal powers, instead of building them itself, and this Court has sustained it.[2] The Federal Power Act, itself, is an outstanding example. This decision, if it stands,

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[1] Other alternatives, such as construction by a municipality of another state, or by the State of Washington, can be disregarded for obviously practical reasons.

[2] See cases cited in Part II, pp. 52-62.

vitiates that objective with respect to the licensees whom Congress said in Section 7 (a) it preferred to have, and perhaps with respect to all licensees.

The result, in either case, is a veto by the State Game Commission, in its administrative judgment (Resolution, R. 175), of the federal statutory structure, a veto of the preference granted by Section 7 (a) of the Federal Power Act to municipalities, a veto of the Federal Power Commission's determination as to the best-adapted project, and a veto of its finding as to the necessity for early construction of this project in the public interest. The result would necessarily be abandonment of the project or the substitution of another plan or of another licensee not measuring up to the federal statutory specifications as applied by the Federal Power Commission in its expert judgment.

Congress did not intend to subject projects licensed by the Federal Power Commission to the veto of a state, whether expressed by legislation or by administrative rulings, as here. See *New Jersey* v. *Sargent*, 269 U. S. 328 (1926); *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377 (1940); *First Iowa Hydro-Elec. Coop.* v. *Federal Power Com'n.*, 328 U. S. 152 (1946); *Iowa* v. *Federal Power Com'n.*, 178 F. 2d 421 (8th Cir. 1949), *cert. denied*, 339 U. S. 979 (1950); *State of Washington Dept. of Game* v. *Federal Power Com'n.*, 207 F. 2d 391 (9th Cir. 1953), *cert. denied*, 347 U. S. 936 (1954); *Wisconsin* v. *Federal Power Com'n.*, 214 F. 2d 334 (7th Cir. 1954), *cert. denied*, 348 U. S. 883 (1954); *Federal Power Com'n.* v. *State of Oregon*, 349 U. S. 435 (1955).

Congress granted the power of eminent domain in Section 21 to licensees in order to break log-jams, not

to create them. In Section 7, it directed preference, not disablement, for municipal licensees.

The court below, on the first appeal, said:

> (R. 91): ". . . Having been granted a license by the power commission, we hold that appellant is at the present time in the same position as any other licensee under the act."

The second decision gives municipal licensees a good deal less. With all respect, we think its interpretation of the Federal Power Act was more nearly correct the first time.

II. THE GRANT BY SECTION 21 OF FEDERAL EMINENT DOMAIN POWERS TO THE PETITIONER, A MUNICIPAL LICENSEE AUTHORIZED UNDER THE ACT, IS A VALID EXERCISE BY CONGRESS OF ITS DELEGATED POWER UNDER THE CONSTITUTION OVER INTERSTATE COMMERCE, WHICH MAY NOT BE VETOED BY THE STATE OF WASHINGTON

A. No Section of the Federal Power Act has been ruled unconstitutional and all State efforts to veto licensed projects have been rejected by the Court.

The first state attack upon the constitutionality of the Federal Water Power Act of 1920 reaching this Court was *New Jersey* v. *Sargent*, 269 U. S. 328 (1926), an original action filed by New Jersey against the Attorney General of the United States and members of the Federal Power Commission. This Court dismissed the bill for lack of a justiciable controversy, but only after stating:

> ". . . the power to regulate interstate and foreign commerce, which the Constitution vests in Congress, includes the power to control, for the purposes of such commerce, all navigable waters which are accessible to it and within the United States, whether within or without the limits of a state

> . . .; *and that the authority and rights of a state in respect of such waters within its limits, and in respect of the lands under them, are subordinate to this power of Congress.*" (p. 337) (Emphasis supplied.)

In *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377 (1940), this Court, in a sweeping opinion, upheld the validity of sections 10a, 10c, 10d, 10e and 14 of the Act[1] over the objections of forty-one States joining the respondent as *amici*. To the objection that Congress could not impose federal conditions upon the respondent power company in addition to its obligations under state law, this Court stated:

> ". . . The license conditions to which objection is made have an obvious relationship to the exercise of the commerce power. Even if there were no such relationship the plenary power of Congress over navigable waters would empower it to deny the privilege of constructing an obstruction in those waters. *It may likewise grant the privilege on terms.* It is no objection to the terms and to the exertion of the power that 'its exercise is attended by the same incidents which attend the exercise of the police power of the states.' The Congressional authority under the commerce clause is complete unless limited by the Fifth Amendment." (p. 427) (Emphasis supplied.)[2]

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[1] 16 U.S.C.A. §§ 803(a), 803(c), 803(d), 803(e) and 807. These provide for conditions in licenses concerning maintenance and repair of project works, setting up of amortization reserves, payment of annual charges, and the right of the Government to take over project works.

[2] In answer to the specific objection to the recapture rights of the Federal Government under Section 14, the Court stated:

> ". . . Since the United States might erect a structure in

In *First Iowa Hydro-Electric Coop.* v. *Federal Power Comm.*, 328 U. S. 152 (1946), this Court held that requirements of state law which conflict with or duplicate the express federal rights and powers granted by the Act are void.

The Court stated:

> "To require the petitioner to secure the actual grant to it of a State permit under § 7767 as a condition precedent to securing a federal license for the same project under the Federal Power Act would vest in the Executive Council of Iowa a veto power over the federal project. Such a veto power easily could destroy the effectiveness of the federal act. It would subordinate to the control of the State the 'comprehensive' planning which the Act provides shall depend upon the judgment of the Federal Power Commission or other representatives of the Federal Government" (p. 164).
>
> ". . . The contention of the State of Iowa is comparable to that which was presented on behalf of 41 States and rejected by this Court in United States v. Appalachian Electric Power Co., 311 U. S. 377, 404, 405, 426, 427 . . ." (pp. 181-182)

In *State of Wash. Dept. of Game* v. *Federal Power Com'n.*, 207 F. 2d 391 (9th Cir. 1953), *cert. denied*, 347 U. S. 936 (1954) (Appendix D), a prior proceeding in the present controversy (discussed, *infra*, pp. 67-75), the court held invalid, on the strength of the *First Iowa* case, those asserted provisions of Wash-

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these waters itself, even one equipped for electrical generation, it may constitutionally acquire one already built.

"Such an acquisition or such an option to acquire is not an invasion of the sovereignty of a state. . . ." (p. 428.)

Section 21, like Section 14, is at least equally related to navigation in that the exercise of the right therein is a prerequisite to the very construction of the project.

ington law which would prevent the City of Tacoma from building the Cowlitz Project. The court held:

> "The Commission in our case acted within the scope of its discretion in not requiring Tacoma to show compliance with the laws of the State of Washington regulating the construction of dams in Washington, because compliance with those laws would have prevented the development of the Cowlitz Project; and in the opinion of the Commission of the Cowlitz Project was 'best adapted to a comprehensive plan' for the development of a concededly navigable stream. The Federal Government's Constitutional authority to regulate commerce and navigation includes the 'power to control the erection of structures in navigable waters,' United States v. Appalachian Power Co., 1940, 311 U. S. 377, 405, 61 S. Ct. 291, 298, 85 L. Ed. 243. The Federal Government's power over navigable waters is superior to that of the state. McCready v. Virginia, 1876, 94 U. S. 391, 24 L. Ed. 248." (p. 396)

The latest attempt by a state to condition construction of a licensed project upon compliance with state law was rejected by this Court in *Federal Power Com'n.* v. *Oregon,* 349 U. S. 435 (1955). There Oregon, joined by several other states as *amici,* contended *inter alia,* that the licensee must obtain the consent of Oregon for construction of a proposed dam on the Deschutes River and comply with Oregon laws for the protection of anadromous fish. In rejecting the State's contention, this Court stated:

> ". . . To allow Oregon to veto such use, by requiring the State's additional permission, would result in the very duplication of regulatory control precluded by the First Iowa decision. 328 U. S. 152, 177-179, 90 L. ed. 1143, 1156-1158, 66 S.

Ct. 906. No such duplication of authority is called for by the Act. The Court of Appeals in the instant case agrees. 211 F. 2d, at 351. And see Washington Dept. of Game v. Federal Power Com. (C. A. 9th) 207 F. 2d 391, 395, 396. . . ." (p. 445).

Hence, this Court has consistently upheld the validity of those "detailed provisions of the Act" it has considered, and uniformly rejected any necessity that licensees comply with conflicting or duplicating state requirements.

". . . In such matters there can be no divided empire." *Green Bay & M. Canal Co.* v. *Patten Paper Co.*, 172 U. S. 58, 80 (1898).

B. When acting pursuant to its Constitutional Powers Over Interstate Commerce, the Federal Government has power to condemn State-owned land dedicated to a public use.

The power of the Federal Government to construct dams in aid of navigation is clear. *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 326-330 (1936); *Arizona* v. *California*, 283 U. S. 423, 451-452 (1931); see *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377, 428 (1940).

The power of the Federal Government to condemn lands for dams in aid of navigation is also clear. *United States ex rel. T. V. A.* v. *Welch*, 327 U. S. 546, 553-555 (1946); *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.*, 313 U. S. 508 (1941); see *United States* v. *Twin City Power Co.*, 350 U. S. 222 (1956); *United States* v. *River Rouge Improvement Co.*, 269 U. S. 411 (1926); and *Monongahela Navigation Company* v. *United States*, 148 U. S. 312 (1893), where the United States' condemnation power was assumed.

The Federal Government may exercise its eminent domain powers without obtaining the consent of the State wherein the lands are located. *Chappell v. United States,* 160 U. S. 499, 510 (1896); *Luxton* v. *North River Bridge Co.,* 153 U. S. 525, 530 (1894); *Kohl* v. *United States,* 91 U. S. 367, 371, 374 (1876); *United States* v. *2902 Acres of Land,* 49 F. Supp. 595 (D. Wyo. 1943); *United States* v. *2715.98 Acres of Land,* 44 F. Supp. 683, 684 (W. D. Wash. 1942); see *James* v. *Dravo Contracting Co.,* 302 U. S. 134, 147 (1937), as well as cases listed *infra,* p. 51. In the early leading case of *Kohl* v. *United States, supra,* it was stated:

> ". . . The powers vested by the Constitution in the General Government demand for their exercise the acquisition of lands in all the States. These are needed for forts, armories and arsenals, for navy yards and light-houses, for custom-houses, postoffices, and court-houses, and for other public uses. If the right to acquire property for such uses may be made a barren right by the unwillingness of property holders to sell, *or by the action of a State prohibiting a sale to the Federal Government, the constitutional grants of power may be rendered nugatory, and the Government is dependent for its practical existence upon the will of a State,* or even upon that of a private citizen. This cannot be. . . ." (Emphasis supplied.)

> ". . . If the United States have the power, it must be complete in itself. It can neither be enlarged nor diminished by a State. Nor can any State prescribe the manner in which it must be exercised. *The consent of a State can never be a condition precedent to its enjoyment. . . .*" (p. 374). (Emphasis supplied.)

The Federal Government may exercise its eminent domain power against state lands dedicated to a public

use, without the State's consent. *United States* v. *Carmack*, 329 U. S. 230 (1946); *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.*, 313 U. S. 508 (1941); *United States* v. *Wayne County*, 53 Ct. Cl. 417, 252 U. S. 574 (1920); *United States* v. *State of South Dakota*, 212 F. 2d 14 (8th Cir. 1954); *United States* v. *State of Montana*, 134 F. 2d 194 (9th Cir. 1943), *cert. denied*, 319 U. S. 772; *State of Minnesota* v. *United States*, 125 F. 2d 636 (8th Cir. 1942); *Missouri* v. *Union Elec. Lt. & Power Co.*, 42 F. 2d 692 (C. D. Mo. 1930); *City of Davenport* v. *Three-Fifths of an Acre of Land*, 147 F. Supp. 794 (S. D. Ill. 1957); *United States* v. *.8677 Acre of Land in Richland County*, 42 F. Supp. 91 (E.D. S. C. 1941); *United States* v. *Certain Parcels of Land*, 30 F. Supp. 372 (D. Md. 1939); *United States* v. *City of Tiffin*, 190 F. 279, 281 (C. C. N. D. Ohio 1911); *cf. United States* v. *Gettysburg Elec. R. Co.*, 160 U. S. 668 (1896); *United States* v. *Sixty Acres, More or Less of Land*, 28 F. Supp. 368 (E. D. Ill. 1939); *Stockton* v. *Baltimore & N. Y. R. Co.*, 32 F. 9, 19-21 (C.C.D.N.J. 1887). In *Oklahoma ex. rel. Phillips* v. *Guy F. Atkinson Co., supra*, the State of Oklahoma sought to enjoin condemnation suits brought by the United States for the construction of the Dennison Dam on the Red River. The proposed reservoir would inundate 100,000 acres of land in Oklahoma, including 3,800 acres of state-owned land used for school purposes, a prison farm, highways, rights of way, and bridges, as well as obliterating the State boundary for 40 miles. This Court affirmed the dismissal of the State's suit, stating as follows:

> ". . . Since the construction of this dam and reservoir is a valid exercise by Congress of its commerce power, there is no interference with the sovereignty of the state. United States v.

> Appalachian Electric Power Co., supra (311 U. S. p. 428, ante, 263, 61 S. Ct. 291). The fact that land is owned by a state is no barrier to its condemnation by the United States. Wayne County v. United States, 53 Ct. Cl. (F) 417, affirmed in 252 U. S. 574, 64 L. ed. 723, 40 S. Ct. 394. There is no complaint that any property owner will not receive just compensation for the land taken. . . . Nor can a state call a halt to the exercise of the eminent domain power of the federal government because the subsequent flooding of the land taken will obliterate its boundary. And the suggestion that this project interferes with the state's own program for water development and conservation is likewise of no avail. That program must bow before the 'superior power' of Congress. . . ." (p. 534-535)

In the light of these well established principles, Tacoma can only be denied the right to take the state-owned fish hatchery in question, if Congress may not validly delegate such superior powers to a selected licensee.

C. Congress may grant federal powers to individuals, corporations, and municipalities to promote interstate commerce, in addition to, or in conflict with, their powers and capacity under State law.

1. In general.

The principle that Congress in the furtherance of interstate commerce may validly grant federal powers to selected agents irrespective of the agents' powers and duties under state law, was early established in American constitutional law. In *Gibbons* v. *Ogden*, 9 Wheat. 1 (U. S. 1824) this Court rejected any contention that Gibbons, authorized by federal license from Congress under the Act of February 18, 1793, to carry on the coasting trade, need comply with the laws

of New York as a condition precedent to engaging in interstate commerce within the State. In interpreting the act of Congress the Court held that it granted a federal right to the license holder to do that which the license permitted:

> "The word 'license' means permission or authority; and a license to do any particular thing is a permission or authority to do that thing; and if granted by a person having power to grant it, transfers to the grantee the right to do whatever it purports to authorize. It certainly transfers to him all the right which the grantor can transfer to do what is within the terms of the license." (pp. 213-214).[1]

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[1] See *Sinnot* v. *Davenport*, 22 How. 227 (U. S. 1859), involving the same Act of 1793, where the Court struck down an Alabama vessel registration law as applied to vessels under federal license, on the ground that the state law imposed an additional requirement on a matter covered by Congress:

> ". . . Congress, therefore, has legislated on the very subject which the State act has undertaken to regulate, and has limited its regulation in the matter to a registry at the home port" (p. 242).

In *Mayor and Board of Aldermen* v. *McNeely*, 274 U. S. 676 (1927), a ferry owner, licensed solely under the laws of the United States, objected to the necessity of obtaining a local license. This Court ruled:

> ". . . The complainant, according to the record, has full capacity to operate, and is operating a serviceable ferry over the Mississippi and the town is attempting to exclude his ferry on the ground that he is operating it without a local license. The question is not whether the town may fix reasonable rates applicable to ferriage from its river front or may prescribe reasonable regulations calculated to secure safety and convenience in the conduct of the business, but whether it may make its consent and license a condition precedent to a right to engage therein. This we hold it may not do." (p. 683).

A recognized leading case on Congress' power to confer additional federal powers on state created corporations is Mr. Justice Bradley's decision while on circuit in *Stockton* v. *Baltimore & N. Y. R. Co.*, 32 F. 9 (C.C.D.N.J. 1887).[1] This was a suit by the Attorney General of New Jersey to enjoin two companies, one a corporation of New York, and the other created by New Jersey, from erecting a bridge on state lands between New Jersey and Staten Island in New York, so authorized by an act of Congress. New Jersey contended that the Act merely gave the permission of Congress, leaving the companies to acquire state authority; that the New York corporation had no authority from New Jersey to exercise any corporate franchises therein, and that the New Jersey company could not act beyond its state charter. In rejecting these arguments, the court stated:

> "In our judgment, if congress itself has the power to construct a bridge across a navigable stream for the furtherance of commerce among the states, it may authorize the same to be done by agents, whether individuals, or a corporation created by itself, or a state corporation already existing and concerned in the enterprise. The objection that congress cannot confer powers on a state corporation is untenable. It has used their agency for carrying on its own purposes from an early period. It adopted as post-roads the turnpikes belonging to the various turnpike corporations of the country, as far back as such corporations were known, and subjected them to burdens, and accorded to them privileges, arising out of that re-

[1] Cited by this Court with approval in *United States* v. *Carmack*, 329 U.S. 230, 240 (1946); *United States* v. *Wayne County*, 252 U.S. 574 (1920), affirming 53 Ct. Cls. 417; *Luxton* v. *North River Bridge Co.*, 153 U.S. 525, 532 (1894); *Cherokee Nation* v. *Southern Kansas Railway Co.*, 135 U.S. 641 (1890).

lation. It continued the same system with regard to canals and railroads, when these modes of transportation came into existence. Nearly half a century ago, it constituted every railroad built, or to be built, in the United States, a post-road. This, of course, involved duties, and conferred privileges and powers, not contained in their original charter. In 1866, congress authorized every steam-railroad company in the United States to carry passengers and goods on their way from one state to another, and to receive compensation therefor, and to connect with roads of other states, so as to form continuous lines for the transportation of the same to the place of destination. The powers thus conferred were independent of the powers conferred by the charter of any railroad company. Surely these acts of congress cannot be condemned as unconstitutional exertions of power." (p. 15)

In analyzing the objection of lack of corporate capacity under state law, the court concluded that:

". . . we are brought back to the question of the power of congress to build the bridge, and whether that power is independent of the consent and concurrence of the state government. And, in our judgment, this question must be answered in the affirmative." (p. 16)[1]

Mr. Justice Bradley's reference to Congress' extensive employment of existing state corporations to carry

[1] The principles expressed in the *Stockton* case have been followed by state courts. In *People* v. *Hudson River Connecting Railroad Corp.*, 228 N. Y. 203, 126 N. E. 801, *cert. denied*, 254 U. S. 631 (1920), New York sought to halt the construction of a bridge across the Hudson by a New York corporation pursuant to an Act of Congress, by amending the corporation's charter and requiring approval by the New York state engineer. The New York Court of Appeals held that Congress had plenary power in the area, and that the federal charter was controlling.

out federal purposes and the endowment of such corporations with federal powers over and above those conferred by their state charters can be well documented. At the time of the *Stockton* decision there were over 150 federal statutes authorizing state created private or municipal corporations to construct bridges over navigable streams in the United States.[1]

The post roads act of July 24, 1866, had granted to state telegraph corporations a federal franchise in addition to that held by the corporation under state law. The federal right so conferred has been upheld by this Court against state legislation, restricting such corporate powers to a domestic corporation. *Pensacola Tel. Co.* v. *Western Union Tel. Co.*, 98 U.S. 1 (1878), and against state legislation applied so as to restrain a state-created corporation from exercising its federal rights, *Essex* v. *New England Telegraph Co.*, 239 U.S. 313 (1915).

With respect to railroads, Congress has both created federal corporations and has endowed state corporations with federal powers in order that they might carry out congressional purposes in the field of railroad transportation. *California* v. *Central Pacific R. Co.*, 127 U.S. 1, 39 (1888); see *Hooper* v. *California*, 155 U.S. 648, 652-653 (1895); *Central Pacific R. Co.* v. *California*, 162 U.S. 91, 123-124, 127 (1896); *Union Pacific R. Co.* v. *Myers*, (Pacific R.R. Removal Cases), 115 U.S. 1, 16, 18 (1885); *Ames* v. *Kansas*, 111 U.S. 449, 462 (1884); *United States* v. *Central Pacific R.R. Co.*, 99 U.S. 449, 450 (1879); *Central Pacific R.R. Co* v.

[1] See *Laws of the United States Related to the Construction of Bridges over the Navigable Waters of the United States* (War Department, 1887).

Gallatin, 99 U.S. 727, 729, 730 (1879). And in *Southern Pacific Railroad Company* v. *United States*, 183 U.S. 519, 527 (1902), Mr. Justice Brewer concluded for the Court:

> "... It is well settled that Congress has power to grant to a corporation created by a state additional franchises—at least franchises of a similar nature. ..."

The rationale of these cases has been recently followed by this Court in *Seaboard Air Line R. Co.* v. *Daniel*, 333 U. S. 118 (1948). There South Carolina objected to an order by the Interstate Commerce Commission under the Transportation Act which authorized Seaboard (a Virginia corporation) to own and operate a railroad system within South Carolina, without complying with the South Carolina corporation laws requiring such operation only by a state-created corporation. The Court held:

> ". . . Although the [Act] bars creation of a federal corporation, it clearly authorizes a railroad corporation to exercise the powers therein granted over and above those bestowed upon it by the state of its creation. These federally conferred powers can be exercised in the same manner as though they had been granted to a federally created corporation. See California v. Central P. R. Co., 127 U. S. 1, 38, 40-45. Here, just as a federally created railroad corporation could for federal purposes operate in South Carolina, so can this Virginia corporation exercise its federally granted power to operate in that State." (pp. 126-127).[1]

[1] The power of Congress to create a federal corporation and grant it rights and immunities irrespective of state law has been well established since *M'Culloch* v. *Maryland*, 4 Wheat. 316 (1819), and sustained many times. *Davis* v. *Elmira Savings Bank*, 161

2. Congress May Specifically Endow a State Corporation With Federal Eminent Domain Powers

The cases are clear that Congress has broad discretion to confer federal eminent domain powers on others. In *Berman* v. *Parker,* 348 U. S. 26 (1954), the Court upheld the grant of such powers to private corporations:

> "Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end. See *Luxton* v. *North River Bridge Co.,* 153 U. S. 525, 529, 530; *United States* v. *Gettysburg Electric R. Co.,* 160 U. S. 668, 679. Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established. . . . The public end may be as well or better served through an agency of private enterprise than through a department of government—or so the Congress might conclude . . ." (p. 33)

Congress may create a federal corporation and vest it with eminent domain powers, *Luxton* v. *North River Bridge Co.,* 153 U. S. 525 (1894), or delegate the right to a corporation created under state laws. *Cherokee Nation* v. *Southern Kansas R. Co.,* 135 U. S. 641, 656-

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U.S. 275 (1896); *Sloan Shipyards Corp.* v. *United States Shipping Board Emergency Fleet Corp.,* 258 U.S. 549, 566 (1922); *New York ex rel. Rogers* v. *Graves,* 299 U.S. 401, 406 (1937); *Pittman* v. *Home Owners' Loan Corp.,* 308 U.S. 21, 32-33 (1939); *Keifer & Keifer* v. *Reconstruction Finance Corp.,* 306 U.S. 381, 389 (1939).

658 (1890);[1] *Thatcher* v. *Tennessee Gas Transmission Co.*, 180 F. 2d 644, 647-648 (5th Cir. 1950), *cert. denied*, 340 U. S. 829; *Tennessee Gas Transmission Co.* v. *Cleveland Trust Co.*, 120 N. E. 2d 137 (1953); *Tennessee Gas Transmission Co.* v. *Cleveland Trust Co.*, 120 N. E. 2d 143 (1953); *cf. Western Union* v. *Pennsylvania R.R. Co.*, 195 U. S. 540 (1904); *Stockton* v. *Baltimore & N. Y. R. Co.*, 32 F. 9, 17-21 (C.C.D.N.J. 1887). The well-reasoned *Thatcher* case upheld Section 7 (h) of the Natural Gas Act, which paraphrases Section 21 of the Federal Power Act,[2] stating as follows:

> "There is no novelty in the proposition that Congress in furtherance of its power to regulate commerce may delegate the power of eminent domain to a corporation, which though a private one, is yet, because of the nature and utility of the business functions it discharges, a public utility, and consequently subject to regulation by the Sovereign. . . ." (p. 647)

In Nichols on Eminent Domain (3rd Ed.), Section 2.15, the matter is put as follows:

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[1] Federal eminent domain powers have been granted to railroad companies in a number of statutes: § 3 of Act of July 2, 1864, 13 Stat. 356, ch. 216 (Union Pacific R.R.); § 7 of Act of July 2, 1864, 13 Stat. 365, ch. 217 (Northern Pacific R.R.); § 7 of Act of July 27, 1866, 14 Stat. 292, ch. 278 (Atlantic and Pacific R.R.); *cf.* § 10 of Act of March 3, 1871, 16 Stat. 573, ch. 122 (Texas Pacific R.R.), power of eminent domain to be exercised in accordance with procedure established by state laws. In *United States* v. *Union Pacific Railroad Co.*, 353 U.S. 112 (1957), Mr. Justice Frankfurter, in his dissent, while commenting on the "liberality" of Congress in the railroad grant acts, notes "§ 3 of the 1864 amendment to the Act before us", which "gave the railroad power to take by eminent domain a two-hundred-foot right of way over privately owned land." (p. 132.) See also *Noble* v. *Oklahoma City*, 297 U.S. 481, 494 (1936).

[2] See p. 34, *supra*.

> "... *In such cases Congress may create its own instrumentalities or use those already existing, and it may give to a corporation organized under authority of a state power which the state did not give it and could not constitutionally have given it.*" (Emphasis supplied.)

Similarly, Congress may confer eminent domain powers on a municipality or other subdivision of a state, irrespective of its powers under state law. *Latinette* v. *City of St. Louis,* 201 F. 676 (7th Cir. 1912); *City of Davenport* v. *Three-Fifths of an Acre of Land,* 147 F. Supp. 794 (S. D. Ill. 1957); *Haeussler* v. *City of St. Louis,* 205 Mo. 656, 687-88, 103 S. W. 1034, 1042 (1907); see *Kline* v. *City of Louisville,* 224 Ky. 624, 6 S. W. 2d 1104 (1928).[1] In the *Latinette* case Congress had authorized the City of St. Louis to condemn land in Illinois for a bridge across the Mississippi River, but the City lacked eminent domain powers under Illinois law. The Court held:

> "... . that the nation had the right itself to build and maintain the bridge and approaches, and, for the purpose of acquiring land for the approaches, to exercise the power of eminent domain either directly or through a corporation created by it for that end, without the consent or over the objection of the state—are propositions too well settled to warrant elaboration or debate. Kohl v. U. S., 91 U. S. 367, 23 L. Ed. 449; California v. Pacific R. Co., 127 U. S. 39, 8 Sup. Ct. 1073, 32 L. Ed. 150; Luxton v. North River Bridge Co., 153 U. S. 525, 14 Sup. Ct. 891, 38 L. Ed. 808; Wilson v. Shaw,

[1] Cf. *Stone* v. *Southern Illinois and Missouri Bridge Co.,* 206 U.S. 267 (1907), affirming 174 Mo. 1, 73 S.W. 453; and *Hagerla* v. *Mississippi River Power Co.,* 202 F. 776, 784-5 (S.D. Iowa 1913), which recognize the right of a state to endow a foreign corporation with the right of eminent domain even though the corporation does not have that power under its charter in the state of its creation.

204 U. S. 24, 27 Sup. Ct. 233, 51 L. Ed. 351. Contention is therefore narrowed to this: That Congress could not constitutionally select appellee as the agency through which a national power should be exercised. Nothing in the Constitution forbids the selection of a state corporation as a national agent. *In reason the material thing is the principal's authority, not the parentage or birthplace of the agent. . . .*" (pp. 678-79). (Emphasis supplied.)

In *Alabama Power Co.* v. *Gulf Power Co.*, 283 F. 606 (M. D. Ala. 1922), the court, in an oft-cited opinion,[1] upheld the constitutionality of Section 21 of the Power Act:

". . . [Section 21] confers upon the agency of the United States, selected under the legislative authority, which agency is the licensee, the power and duty to act in reference to the navigation project both in its construction and in its maintenance. . . .

"Now it is clear that the government has the right to condemn private property for public use and the private right or use for or benefit is immaterial so far as the validity of the Act is concerned. It is settled that Congress can delegate the right of eminent domain to a federal agency selected pursuant to the congressional authority, an agency for carrying out its policy and principles in an administrative way in the development or improvement of navigation. . . ." (p. 616).

That Congress' duly selected agent must take state lands without the state's consent, is no bar to the power of Congress to delegate the right of eminent

[1] Cited with approval by this Court in *First Iowa Hydro-Elec. Coop.* v. *Federal Power Com'n*, 328 U.S. 152 at 176 (1946).

domain to effectuate the federal purposes involved. *Stockton* v. *Baltimore & N. Y. R. Co.*, 32 F. 9, 17-21 (C.C.D.N.J. 1887); *City of Davenport* v. *Three-Fifths of an Acre of Land*, 147 F. Supp. 794 (S. D. Ill. 1957); *Missouri* v. *Union Elec. Lt. & Power Co.*, 42 2d 692 (C.D. Mo. 1930); *cf.* cases cited *supra*, p. 51. *Missouri* v. *Union Elec. Lt. & Power Co.*, in upholding a condemnation action under Section 21 as against state-owned land devoted to a public use, stated:

> ". . . To deny the right of eminent domain as against this public property would not only defeat the functions of the national government but would run contrary to the obvious intent of the Congress as expressed in the Water Power Act." (p. 698)

D. Section 21 is a valid exercise by Congress of its power under the commerce clause to regulate the use of navigable streams by states and municipalities.

While the court below found no specific condemnation "power or capacity" in Tacoma under state law for the taking of the hatchery, it in no way indicated that Tacoma lacked general power or capacity under state law to engage in the power business and to accept a federal license under the Federal Power Act as held in *State of Wash. Dept. of Game* v. *Federal Power Com'n.*, 207 F. 2d 391 (9th Cir. 1953), *cert. denied*, 347 U. S. 936 (1954). To the contrary, its rulings in Tacoma's favor on questions other than the issue of condemnation (R. 370-371) show approval of its earlier holding in the ruling on demurrer that:

> "The Federal Power Act defines the term municipal corporation and authorizes the power commission to issue a license to such an entity. Ap-

> pellant has complied with the state law with respect to the right of a municipality to engage in the business of developing, transmitting and distributing power. Having been granted a license by the power commission, we hold that appellant is at the present time in the same position as any other licensee under the act. . . ." (R. 91)

Hence, the State of Washington has authorized its municipalities to engage in the power business and acquire federal licenses under the Federal Power Act.[1] Having so subjected its "creatures" to federal regulatory control, may the State thereafter preclude applicability of particular incidents thereof, *i.e.*, Section 21? Decisions of this Court indicate not.

In *California* v. *Taylor*, 353 U. S. 553, 568 (1957), following *United States* v. *California*, 297 U.S. 175 (1936), this Court held that where the State of California had permitted the "State Belt Railroad", owned and operated by the State, to engage in interstate commerce, it thereafter became subject to the control of Congress under the Railway Labor Act, regulating labor relation matters, regardless of the contrary requirements of the State Civil Service laws:

> "Finally, the State suggests that Congress has no Constitutional power to interfere with the 'sovereign right' of a State to control its employment relationships on a state-owned railroad engaged in interstate commerce. In United States v. California (US) supra, this Court said that the State although acting in its sovereign capacity in operating this Belt Railroad, necessarily so acted

[1] At present, ten licenses for major hydroelectric projects are held by municipalities and public utility districts of the State of Washington. *Federal Power Commission Thirty-Seventh Annual Report*, Fiscal Year 1957, p. 95.

'in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government'. 297 U.S., at 184. *'California, by engaging in interstate commerce by rail, has subjected itself to the commerce power,* and is liable for a violation of the Safety Appliance Act, as are other carriers. . . .' Id. 297 U.S., at 185. That principle is no less applicable here. *If California, by engaging in interstate commerce by rail, subjects itself to the commerce power so that Congress can make it conform to federal safety requirements, it also has subjected itself to that power so that Congress can regulate its employment relationships. . . .*" (Emphasis supplied.)

When thus subject to the commerce clause, it is clear that charter or corporate limitations under state law are no bar to compliance with federal requirements. *Texas* v. *United States,* 292 U. S. 522, 535 (1934); *Colorado* v. *United States,* 271 U. S. 153, 165-166 (1926); *New York Central Securities Corp.* v. *United States,* 287 U. S. 12, 27 (1932); *New York* v. *United States,* 257 U. S. 591, 601 (1922); *Northern Securities Co.* v. *United States,* 193 U. S. 197, 350 (1904); *cf. Schwabacher* v. *United States,* 334 U. S. 182, 198 (1948); *Northwestern Electric Co.* v. *Federal Power Com'n.,* 321 U. S. 119 (1944); *Sanitary District of Chicago* v. *United States,* 266 U. S. 405, 426 (1925); *West* v. *Kansas Natural Gas Co.,* 221 U. S. 229, 261, 262 (1911). In *Colorado* v. *United States,* Colorado sought to enjoin the Interstate Commerce Commission from ordering the abandonment of a branch line in Colorado of a Colorado corporation, constructed and acquired solely under state authority. Mr. Justice Brandeis, speaking for the Court, rejected the State's contention:

". . . The obligation assumed by the corporation under its charter of providing intrastate service on every part of its line within the state is subordinate to the performance by it of its Federal duty, also assumed, efficiently to render transportation services in interstate commerce. . . . *But even explicit charter provisions must yield to the paramount power of Congress to regulate interstate commerce.* New York v. United States, 257 U.S. 591, 601. Because the same instrumentality serves both, Congress has power to assume not only some control but paramount control in so far as interstate commerce is involved . . . . The power to make the determination inheres in the United States as an incident of its power over interstate commerce. The making of this determination involves an exercise of judgment upon the facts of the particular case. *The authority to find the facts and to exercise thereon the judgment whether abandonment is consistent with public convenience and necessity, Congress conferred upon the Commission.*" (pp. 165-166) (Emphasis supplied.)[1]

The Federal Water Power Act of 1920 embodied a "complete scheme of national regulation" designed to "promote the comprehensive development of the water resources of the Nation."[2] Section 21 thereunder authorizes the taking of lands for an improvement "*which in the judgment of the commission* is desirable and justified in the public interest for the purpose of

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[1] In *United States ex rel. Chapman* v. *Federal Power Com'n*, 345 U.S. 153, 168 (1953), this Court noted that the functions and powers of the Federal Power Commission are "comparable to those of the Interstate Commerce Commission in the field of transportation."

[2] *First Iowa Hydro-Elec. Coop.* v. *Federal Power Com'n*, 328 U.S. 152, 180 (1946).

improving or developing a waterway or waterways for the use or benefit of interstate commerce." (Emphasis supplied.) Since the State of Washington has permitted its municipalities to acquire licenses under the Act and receive the benefits thereof, it has subjected itself to the federal plan of control, the incidents of which may not be vetoed by the assertion of any lack of *state* power or capacity in the federal licensee.

III. THE COURT BELOW ERRED IN NOT RECOGNIZING THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS AS FINAL ON THE QUESTION OF THE CITY'S CAPACITY TO ACCEPT THE FEDERAL LICENSE AND TO TAKE ALL LANDS NECESSARY FOR THE CONSTRUCTION OF THE PROJECT THEREUNDER

A. Finality of review under Sec. 313(b) of the Federal Power Act.

The proceedings in the Ninth Circuit, discussed *infra,* were under section 313 (b) of the Federal Power Act. That section (16 U. S. C. § 825*l* (b)) provides:

> ". . . The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, *shall be final,* subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28." (Emphasis supplied.)

Section 313(b) provides "a new and specific and complete remedy fully covering the subject matter" which is "exclusive." *Safe Harbor Water Power Corp.* v. *Federal Power Com'n.,* 124 F. 2d 800, 804 (3d Cir. 1941), *cert. denied,* 316 U.S. 663 (1942). There can be no doubt that Congress, apart from constitutional requirements, may determine "[w]hen judicial review is available and under what circumstances." *National*

Labor Relations Bd. v. *Cheney California Lumber Co.*, 327 U.S. 385, 388 (1946). When Congress has thus set forth a definite and special scheme of review, it may not be circumvented by resort to other forms of judicial review or determination de novo of the merits of the controversy. See, *e.g.*, *Myers* v. *Bethlehem Shipbldg. Corp.*, 303 U. S. 41, 48-50 (1938); *United States* v. *Corrick*, 298 U. S. 435 (1936); *Washington Terminal Co.* v. *Boswell*, 124 F. 2d 235 (D.C. Cir. 1941), *aff'd by equally divided Court*, 319 U. S. 732 (1943). The logic of these cases would a fortiori bar a collateral attack upon the license in the State courts.

B. Proceedings before the Ninth Circuit Court of Appeals.

1. *Identity of parties: The State was a party to the judgment of the Ninth Circuit Court of Appeals.*

It is clear that the "State of Washington, a Sovereign State", was a party to the final judgment below (R. 372), whether or not it was a party to the judgment in Tacoma's favor on demurrer (R. 64).[1]

It is also clear that the State of Washington was a party to the proceedings on Tacoma's license application before the Federal Power Commission and the

[1] The majority of the Washington Supreme Court below, while conceding that the State was a party to the Ninth Circuit case (R. 268), ruled (R. 278) that the State, as a "Sovereign State", was not a party to the first decision by the Washington Supreme Court (43 Wn. 2d 468, 262 P. 2d 214 (1953), R. 65). We think this ruling erroneous for the reasons stated in the dissenting opinion (R. 296-299). In any event, the res judicata issue with respect to the Ninth Circuit judgment seems so clear as to make it unnecessary to argue that the State's present contention was precluded also by the State court's judgment on demurrer (R. 64).

Ninth Circuit Court of Appeals. The court below so held (R. 269).

2. *Identity of issues: The inundation of the state-owned fish hatchery by Mayfield Dam, proposed to be constructed under the license, was known and specifically asserted as a defense by the Directors and State during the proceedings before the Federal Power Commission, and was asserted in general in their appeal to the Ninth Circuit and on certiorari to this Court.*

The respondent State and Directors' Petition of Intervention before the Federal Power Commission opposed the granting of the license, specifically alleging in paragraph nine:

> "That the reservoirs which would be created by the proposed dams would inundate a valuable and irreplacable fish hatchery owned by the State of Washington, as well as much productive spawning areas" (R. 292).

Thereafter at the hearing before a Commission Examiner, the interveners presented the testimony of Robert Meigs, Assistant Chief of the Fish Management Division for the Washington State Department of Game, as follows (R. 293):

> "Q. Now, does the State of Washington Game Department have a hatchery on the Cowlitz watershed?
>
> "A. Yes, we have what we refer to as the Mossyrock Hatchery, which is located a short distance from Mossyrock, Washington [Ninth Circuit Court of Appeals record, p. 3348].
>
> "Q. Is it within the area that would be inundated by these dams?
>
> "A. According to information furnished us by Tacoma, the flood line from the Mayfield reservoir

would extend some 400 feet past the hatchery and would flood it out.

"Mr. Mason: You mean 400 feet vertically or horizontally?

"The Witness: That I don't recall. I don't think vertically; horizontally."

The Commission in its opinion overruling the objections of the interveners noted that:

> ". . . As a complement to the other fish protection measures, both as related to upstream migrations, the City proposes to construct and operate extensive fish hatchery facilities for artificial propagation of the fish and development of fingerlings capable of making the migrations to the sea." (R. 24)

The Commission ordered the City, as a condition to proceeding under the license, to construct fish handling facilities estimated to cost $9,465,000 (Finding (47), R. 38), as follows:

> "*Article 31.* The Licensee shall construct, maintain and operate such fish ladders, fish traps or other fish handling facilities or fish protective devices and make such stream improvements and provide such fish hatcheries and similar facilities and comply with such reasonable modifications of the project structures and operation in the interest of fish as may be prescribed hereafter by the Commission upon its own motion or upon the recommendation of the Secretary of the Interior." (R. 46)

The license issued by the Commission to the City expressly described and authorized the Mayfield development:

> ". . . to have a maximum height of about 240 feet above bedrock and a length of about 850 feet

> at its crest; a reservoir extending approximately 13.5 miles upstream to the Mossyrock dam with an area of about 2,200 acres with normal water surface at elevation 425 feet. . . ." (Finding 63 (b), R. 41)

Hence, it was clear that the license issued to the City by the Commission, over the State's objections, would inundate portions of the existing State fish hatchery, and that Tacoma would be required to build new hatcheries. The Commission further expressly found:

> "(53) The Applicant is a municipal corporation; it has submitted satisfactory evidence of compliance with the requirements of all applicable State laws insofar as necessary to effect the purposes of a license for the project; and it is a municipality within the meaning of Section 3(7) of the Act." (R. 39)

In their appeal from the Commission's Order to the Ninth Circuit Court of Appeals, the State and Directors, while they made no express mention of the proposed inundation of the State-owned hatchery, did assign as a "Specification of Error" that:

> "The Orders of the Commission of November 28, 1951, and January 24, 1952, deprive Petitioners of their property and property rights without due process of law and are in contravention of the Constitution of the United States." (Opening Brief for Petitioners, p. 17.)[1]

And at pages 65-67 of their brief contended as follows:

> "We have previously shown that the ownership of the fish within the waters of the State is in the people of the State. Likewise, the beds and banks

[1] The Commission's Order issuing the license was dated November 28, 1951 (R. 27); its Order denying rehearing dated January 24, 1952 (R. 49).

of the Cowlitz River, including the spawning beds of the salmon within the river and its tributaries, are the property of the State. *First Iowa Case, supra, United States* v. *Cress,* 243 U. S. 316, 61 L. Ed. 746.

". . . Contrary to the express mandate of the people of the State of Washington, acting through their legislature, the City of Tacoma, acting under purported license of the Federal Power Commission, intends to proceed toward the destruction of the Cowlitz fishery and to take for its own use the property of the State. . . .

"The *Federal Power Act,* therefore, would be contrary to the Fifth Amendment if the Court should conclude that it authorized the City of Tacoma to destroy and take the property of the people of the State of Washington in derogation of the laws of the State and without compensation therefor.

* * *

"Aside from what rights Section 21 (providing for condemnation) provides in respect of the intent of Congress, it specifically accords to a licensee the right of condemnation. *Respondent has not shown, nor could it show, that the City of Tacoma has availed itself of that right or acquired by condemnation any right to take or destroy the property of the State of Washington* and its people. In and of itself *this constitutes a complete bar* to the right of the City of Tacoma to proceed further in the construction of these dams under any license of the Federal Power Commission." (Emphasis supplied.)

Hence, the appealing State and Directors presented as one general issue the effect of constructing the licensed dams upon State property used for the protection and propagation of fish, and the availability to Tacoma of the power of condemnation thereof under

Section 21 of the Federal Power Act. If they did not choose to specify in detail the tracts of land they were talking about, as they had before the Commission, but to include them all under the caption "property", that was their privilege, but it did not affect the finality of the review they sought.

The Ninth Circuit ruled on the general issue as posed by the appealing Directors and State:

> "As we see it, it is not within our jurisdiction to prescribe a policy. The Federal Government has the jurisdiction over navigable rivers and it is within the power of the Congress and the Executive to prescribe the policy in relation thereto. If the dams will destroy the fish industry of the river, we are powerless to prevent it." (*State of Wash. Dept. of Game* v. *Federal Power Com'n.*, 207 F. 2d 391, 398 (9th Cir. 1953), *cert. denied*, 347 U. S. 936 (1954), Appendix D, pp. 123a-124a.)

The Ninth Circuit affirmed the Commission's order, expressly reciting the Commission's finding that:

> "Tacoma is a municipality within the meaning of Section 3 (7) of the Act and has submitted satisfactory evidence of compliance with the requirements of all applicable state laws 'insofar as necessary to effect the purposes of a license for the project' . . ." (207 F. 2d at 394; Appendix D, p. 117a).

Thereafter, the State and Directors raised the same general issue in their petition for a writ of certiorari to this Court, wherein they stated:

> ". . . Contrary to the express mandate of the people of the State of Washington, acting through their legislature, the City of Tacoma, acting under purported license of the Federal Power Commission, intends to proceed toward the destruction of

the Cowlitz fishery and to *take for its own use the property of the state. . . .*

"The Federal Power Act, therefore, would be contrary to the Fifth Amendment if the court should conclude that it authorized the City of Tacoma to destroy and take the property of the people of the State of Washington in derogation of the laws of the state and without compensation therefor." (pp. 31-32) (Emphasis supplied.)

This Court denied certiorari: 347 U. S. 936 (1954) (Appendix D, p. 125a).[1]

We say that the issue here involved, *i.e.*, whether the licensee may build this project, notwithstanding its inclusion of State property which must be condemned under Section 21, was, in fact, litigated before the Federal Power Commission, was decided there, and the decision was affirmed by the Ninth Circuit. But, whether or not the State's title to this specific property was included in the broader property issue which the State raised in the Ninth Circuit and on certiorari, it is clear that it could have been specifically raised there, as it was before the Commission itself (R. 292),

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[1] In *Federal Power Commission* v. *Oregon*, 349 U.S. 435, 443 (1955), this Court referred in a footnote to the case of *State of Washington Dept. of Game* v. *Federal Power Com'n.*, 207 F. 2d 391 (9th Cir. 1954), as follows:

"9. In what is somewhat of a companion case to the one before us, the Court of Appeals for the Ninth Circuit has recognized that, despite contentions as to state control of the use of water and the conservancy of fish within the Columbia River Basin, the Federal Power Commission has the authority to make effective a license and to provide facilities for anadromous fish much as is here proposed, when the waters involved are navigable waters of the United States. Washington Dept. of Game v. Federal Power Com. (CA9th) 207 F2d 391. We denied certiorari April 5, 1954. 347 US 936, 98 L ed 1087, 74 S Ct 626."

and the finality prescribed by Section 313(b) precludes the State's subsequent litigation of it.

3. *The Ninth Circuit decision did not exclude this issue by its dictum relating to corporate powers.*

The majority of the Supreme Court of Washington below ruled that the decision of the Ninth Circuit Court of Appeals was not res judicata of the question of the City's capacity to condemn the fish hatchery lands in question, because of its interpretation of a dictum in that court's decision, allegedly excluding such questions from the scope thereof. That dictum, and its preceding context, are as follows:

> "The objectors further contend that Tacoma, as a creature of the State of Washington, cannot act in opposition to the policy of the State or in derogation of its laws.
>
> "Again, we turn to the First Iowa case, supra. There too, the applicant for a federal license was a creature of the state and the chief opposition came from the state itself. Yet, the Supreme Court permitted the applicant to act inconsistently with the declared policy of its creator, and to prevail in obtaining a license.
>
> "Consistent with the First Iowa case, supra, we conclude that the state laws cannot prevent the Federal Power Commission from issuing a license or bar the licensee from acting under the license to build a dam on a navigable stream since the stream is under the dominion of the United States. *However,* we do not touch the question as to the legal capacity of the City of Tacoma to initiate and act under the license once it is granted. There may be limitations in the City Charter, for instance, as to indebtedness limitations. Questions of this nature may be inquired into by the Commission as relevant to the practicability of the

plan, but the Commission has no power to adjudicate them." (207 F. 2d 391, 396; Appendix D, pp. 120-121a; emphasis supplied.)

Viewed in context, the Ninth Circuit decision holds that a municipality, although a creature of the State, may act under a Federal Power Commission license in derogation of state laws which would veto construction of the project as such, but says, *obiter*, that a municipality may be bound by state laws bearing not upon the construction of the project as such, but bearing, for example, upon the municipality's power to borrow money. The Court's touchstone as to whether state law does or does not govern the activities of the municipality depends on the nature of the question involved. If it relates to the power of the licensee to "build a dam", *i.e.*, those matters expressly covered by Congress under the terms of the Federal Power Act, it falls within the federal orbit and must be presented in the federal proceedings; while if pertaining to visitatorial powers over corporations, or "indebtedness limitations", *i.e.*, those matters which do not relate to the federal power over navigable waters, state law would guide. Based on this test, the Washington Supreme Court below clearly misinterpreted the Ninth Circuit in concluding that the power of the City as licensee to condemn land *necessary for the construction of the project*, a matter expressly covered in the Federal Power Act,[1] is governed by state law, and may be relitigated in the state courts after the Commission and the federal court have authorized construction of a project defined by the Commission as including state-owned lands within its boundaries.

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[1] Section 21, 16 U. S. C. § 814.

C. The decision below, in failing to give finality to proceedings before the Federal Power Commission, affirmed by a Circuit Court of Appeals, conflicts with the opinion of this Court in First Iowa Hydro-Elec. Coop. v. Federal Power Com'n., 328 U. S. 152 (1946).

In the *First Iowa* case, the State of Iowa intervened in the license application proceedings before the Federal Power Commission to contest the issuance of a federal license to a state cooperative association, on the ground that the applicant had not complied with certain state laws controlling the type of project that could be built and requiring a state permit therefor. The State contended that the Coop.'s failure to comply violated § 9 (b).[1] The Commission suspended proceedings on the ground that the state law issue presented was for judicial determination. This Court reversed the Commission, stating:

> "We believe that the Commission would have been justified in proceeding further at that time with its consideration of the petitioner's application upon all the material facts. Such consideration would have included evidence submitted by the petitioner pursuant to § 9 (b) of the Federal Power Act as to the petitioner's compliance with the requirements of the laws of Iowa *with respect to the petitioner's property rights to make its pro-*

[1] Section 9 (b) of the Federal Power Act provides:

> "That each applicant for a license hereunder shall submit to the Commission—
>
> • • •
>
> "(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this Act."

posed use of the affected river beds and banks and to divert and use river water for the proposed power purposes, as well as the petitioner's right, within the State of Iowa, to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of the license. . . . (pp. 160-161). (Emphasis supplied.)

* * *

And, at p. 182:

"It is the Federal Power Commission rather than the Iowa Executive Council that under our constitutional Government must pass upon these issues on behalf of the people of Iowa as well as on behalf of all others."

Mr. Justice Frankfurter, who dissented, nevertheless said:

"To safeguard the interests of the States thus protected by § 9 (b), Congress has directed that notice be given to the State when an application has been filed for a license, the granting of which may especially affect a State. Section 4 (f), 49 Stat. 838, 841, c. 687, 16 U.S.C.A. § 797 (f), 5 F. C. A. title 16, § 797 (f). *If a State does not challenge the claim of an applicant, the evidence submitted by the applicant, if found to be satisfactory by the Commission, has met the demands of § 9 (b), and a State cannot thereafter* challenge the Commission's determination. . . ." (pp. 184-185; emphasis supplied).

In our case, the Commission did proceed to make the determination of the applicability of state law which this Court said the Commission should have made in the *First Iowa* case, and the Ninth Circuit Court of Appeals affirmed under Section 313(b).

The effectiveness of the review proceedings which Congress called "final" in Section 313 (b) is at stake here, if disappointed contestants may relitigate in the state courts the licensee's capacity under state law to accept and execute the powers conferred upon such licensees by the federal law under attack. *Harris* v. *Central Nebraska Public Power & Irr. Dist.*, 29 F. Supp. 425 (D. Neb. 1938); *cf. Venner* v. *Michigan Central Railroad Co.*, 271 U. S. 127, 128 (1926).[1] Review under this statute is the exclusive remedy, and the State exhausted that remedy when this Court denied certiorari in the Ninth Circuit case.

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[1] In the *Harris* case, the Central Nebraska Public Power & Irrigation District, a public agency of the State of Nebraska, sought to condemn lands under Section 21 of the Power Act under the license held by it from the Federal Power Commission. The property owners defended on the ground that Section 21 could not confer a right of eminent domain on the District. The court, after noting that Section 21 powers were an integral part of the license, held:

> "This is a collateral attack on an order of the Federal Power Commission. The Federal Power Act, among other provisions, affords ample opportunity for every interested party to be heard before the Commission before the license is issued. By Section 313(a), 16 U.S.C.A. § 825l, any person aggrieved by an order issued by the Commission in a proceeding under the Act may appear and become a party by intervention, and apply for a re-hearing within thirty days after the issuance of such an order, and may obtain a review in the Circuit Court of Appeals of the United States for any Circuit wherein the licensee is located by filing, within sixty days after the order upon the application for rehearing, a petition praying that the order may be modified or set aside in whole or in part. Such proceedings were disregarded by the land owner in this case. We think they had an opportunity to be heard on the issue which they now raise, but of which they did not avail themselves." (p. 428)

CONCLUSION

The decision below presents the paradox of a holding, on the one hand, that state statutes specifically prohibiting construction of this project are invalid because they would impose a veto upon an authorization lawfully made by the United States (R. 370), and a holding, on the other hand, that an effective veto may be imposed on the same project by mere silence of the legislature (R. 286). This result was reached even though Congress has spoken upon the same subject by authorizing its licensees to exercise the federal power of eminent domain necessary to the construction of such projects. Delegation of the federal power of eminent domain, free of state interference, is, as Congress foresaw and intended, and as this case demonstrates, a necessary ingredient of the licensing system established by the Federal Power Act. That act being constitutional, so is this essential feature of the federal control of the comprehensive development of navigable streams.

The judgment below, insofar as it is adverse to the Petitioner, should be reversed.

Respectfully submitted,

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APPENDIX A

Extracts from the Federal Power Act

(Act of June 10, 1920, as amended, 41 Stat. 1063, 16 U. S. C., *et seq.*)

Section 3 (7) (16 U. S. C. § 796 (7)) and Section 3 (9) (16 U. S. C. § 796 (9)).

The words defined in this section shall have the following meaning:

• • •

(7) "municipality" means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power;

• • •

(9) "municipal purposes" means and includes all purposes within municipal powers as defined by the constitution or laws of the State or by the charter of the municipality. . . .

Section 4 (e) (16 U. S. C. § 797(e)).

The commission is hereby authorized and empowered—

• • •

(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public

lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided,* That licenses shall be issued within any reservation only after a finding by the commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations: *Provided further,* That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting the navigation have been approved by the Chief of Engineers and the Secretary of War. Whenever the contemplated improvement is, in the judgment of the commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the commission, and shall become a part of the records of the Commission: *Provided further,* That in case the commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further,* That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection.

* * *

Section 7 (a) (16 U. S. C. § 800(a)).

(a) In issuing preliminary permits hereunder or licenses where no preliminary permit has been issued and in issuing licenses to new licensees under section 808 of this title the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region; and as between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans.

Section 9 (b) (16 U. S. C. § 802(b)).

That each applicant for a license hereunder shall submit to the commission—

* * *

(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this Act.

Section 21 (16 U. S. C. § 814).

When any licensee cannot acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir,

diversion structure, or the works appurtenant or accessory thereto, in conjunction with an improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided,* That United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

Section 23 (16 U. S. C. § 817).

It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this chapter. Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined in this chapter as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before

such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this chapter. If the Commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws.

Section 27 (16 U. S. C, § 821).

Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

Section 313 (b) (16 U. S. C. § 825 l (b)).

(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Com-

mission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.